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School of Advanced Legal Studies

Faculty of Law

(Public International Law)

Masters Dissertation

**From Persecution to Detention: A reflection on the non-application of Article 31(1) of
the 1951 Refugee Convention on asylum seekers in Zambia**

by

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Supervised by Professor Fatima Khan

24, 950 words

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master of Laws in Public International Law by approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations

Signed by candidate

Abel Katongo Longwe

Dedication

I wish to dedicate this work to all asylum seekers and refugees around the world who continue to suffer persecution perpetrated by institutions and entities created to protect them.

To the God Almighty for His never-ending mercies, blessings and strength.

To my son Theodore Kondwani Longwe for understanding the I had to be away from you in order to achieve this milestone.

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Abbreviations

UDHR : Universal Declaration of Human Rights

OAU : Organisation of African Unity

UNHCR : United Nations high Commission for Refugees

ICCPR : International Covenant on Civil and Political Rights

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CRC : Convention on the Rights of the Child

UN : united Nations

ICESCR: International Covenant on Economic Social and Cultural Rights

IOM : International Organisation for Migration

IRO : International Refugee Organisation

HRC Human Rights Commission

EXCOM: Executive Committee on Migration

RSD : Refugee Status Determination

DJOC : District Joint Operations Committee

PJOC : Provincial Joint Operations Committee

PoC : Persons of Concern

IDC : International Detention Coalition

NRM : National Referral Mechanisms

NEC : National Executive Committee

OCR : Office of the Commissioner for Refugees

CSO : Civil Society Organisations

NGO : Non-Governmental Organisations

UCT : University of Cape Town

UP : Undikumbukire Project

LAZ : Law Association of Zambia

SADC : Southern African Development Community

Abstract

Despite Zambia's ratification of several of international and regional human rights instruments, the country's domestic legislation frustrates its international obligations in so far as protection of asylum seekers human rights is concerned. Principally there are two main pieces of legislation which create this 'quagmire,' but also make provision for the entry and exit of persons in Zambia, these are the Immigration and Deportation Act No. 18 of 2010 (hereinafter referred to as the Immigration Act) and the Refugees Act No. 1 of 2017 (hereinafter the Refugees Act). Although these two pieces of legislation apply to different types of migrants, there is a predisposition on the part of the authorities of enforcing immigration laws and not refugee laws on asylum seekers especially those found unlawfully present in country. This is in contravention of the non-penalisation clause under the 1951 Convention Relating to the Status of Refugees (hereinafter the 1951 Refugee Convention), which creates a dilemma for asylum seekers. Zambia has an international obligation to receive and not to expel asylum seekers present within its territory irrespective of their mode of entry, this responsibility emanates from Article 31(1) and Article 33(2) 1951 Refugee Convention. However, the misapplication of the Immigration Act on asylum seekers conflicts with this obligation.

*"A refugee is an anomaly for whom there is no appropriate niche".
R. Yewdal Jennings 1939*

Title

**FROM PERSECUTION TO DETENTION: A REFLECTION ON THE NON-
APPLICATION OF ARTICLE 31(1) OF THE 1951 REFUGEE CONVENTION ON
ASYLUM SEEKERS IN ZAMBIA**

Chapter One

1. Introduction

In 2017, the instability in Burundi and the Democratic Republic of Congo (DRC) resulted in 18,194 persons applying for asylum in Zambia. As of December 2019, UNHCR and the Government of The Republic of Zambia's countrywide verification exercise also recorded a meagre 76,027 persons of concern, 49, 879 refugees and 3,306 asylum seekers.¹ This has been the trend, despite the country being located in the central part of Southern Africa and possibly being the first safe country for forced migrants from DRC and beyond.² The UNHCR was also informed through its regular visits to detention facilities and reports from detaining authorities that 267 persons of concern were detained for immigration related offences.³ As the immigration authorities lack funds for deportation, irregular immigrants may be detained for extended periods,⁴ longer than the legally stipulated period.⁵

The presence within Zambia of an 'illegal immigrant' is unlawful. The Second Schedule of the Immigration Act defines a prohibited immigrant.⁶ "This includes persons entering without proper travel documents and persons who fail to report to an immigration officer on entering Zambia,"⁷ or persons defined as such by the Minister.⁸ Persons categorised as illegal immigrants may be ordered to leave Zambia⁹ and "are entitled to a forty-eight hours reprieve to make an appeal and representations."¹⁰ Further, "failure to comply with the notice, may lead to arrest without warrant, detention and in most cases deportation from Zambia."¹¹ Persons convicted of an immigration related offence may be liable to imprisonment for twelve months.¹² Despite falling within the protection of refugee laws, this is the fate that meets most asylum seekers who travel to Zambia without any form of identity or falsified documentation.

¹ <https://data2.unhcr.org/en/country/zmb> accessed on 25/11/2019 at 08:55 hours

² <https://reliefweb.int/report/zambia/unicef-zambia-humanitarian-situation-report-reporting-period-january-june-2018> accessed on 6/01/2020 at 19:03 hours

³ UN High Commissioner for Refugees (UNHCR), Progress Report 2018: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers & Refugees, 2014 - 2019, February 2019, available at: <https://www.refworld.org/docid/5c9354074.html> [accessed 20 October 2020]

⁴ Clare Darwin, Report on the situation of Refugees in Zambia, 2016, p.7

⁵ Ibid, n 4, p.24

⁶ Section 35, Second Schedule of the Immigration Act

⁷ Ibid, n 4, p.11

⁸ Ibid, n 4, p.11

⁹ Ibid, n 4, p.12

¹⁰ Ibid, n 4, p.12

¹¹ Ibid, n 4, p.12

¹² Ibid, n 4, p.12

2. Definition of asylum seeker

The focus of this research is to bring to the fore some of the main challenges faced by asylum seekers who arrive in Zambia without any formal documentation. The term asylum seeker will be used to mean those persons seeking refugee status and whose refugee claim has not yet been determined.¹³ Asylum is a Latin word which emanates from a Greek word *asylia* or inviolable. In ancient Greece, inviolability was a trait possessed by persons whose work required them to travel outside their own states such as envoys and merchants.¹⁴ Inviolability was also a characteristic of certain places such as temples, alters and other sanctuaries called *asylia hiera*¹⁵. A person seeking protection from a pursuer would often enter an *asylon hieron* and perform a rite called *hiketeia*. This rite is what is today called asylum-seeking.¹⁶

International refugee law was developed to offer surrogate protection to asylum seekers who may not have the same protection within their own countries.¹⁷ The 1951 Refugee Convention essentially revises and consolidates previous international agreements and extends the scope of and the protection accorded to asylum seekers.¹⁸ According to article 1A (2) of the 1951 Refugee Convention, a person qualifies for international protection if they have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.¹⁹ Asylum seekers found unlawfully present in any State party to the 1951 Refugee Convention are protected from the sanctions of breaching immigration laws under Article 31(1)²⁰ and Article 33(2).²¹

Triggered by the Eurocentric nature of the 1951 Refugee Convention,²² the 1969 OAU Convention on Specific Aspects of Refugees in Africa (hereinafter the 1969 OAU Convention) offers an expanded definition of a refugee to costume the unique set of refugees that began to

¹³ Section 2 of the Refugees Act

¹⁴ Matthew E. Price, *Rethinking Asylum, History, Purpose and Limits*, Cambridge University Press 2009, p.26

¹⁵ *Ibid*, p.26

¹⁶ *Ibid*, p.26

¹⁷ James C. Hathaway, "Refugees and Asylum." In *Foundations of International Migration Law*, edited by B. Opeskin, R. Perruchoud, and J. Redpath-Cross, Cambridge: Cambridge Univ. Press, 2012, p. 182

¹⁸ Cathryn Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, University of Oxford, 2017, p.4

¹⁹ Article 1A (2) of the 1951 Refugee Convention

²⁰ Art. 31(1)-Non-penalisation for illegal entry

²¹ Art. 33(2)-Protection from refoulement

²² Tsion Tadesse Abebe et al, *The 1969 OAU Refugee Convention at 50*, Institute for Security Studies (UNHCR), 2019, p.4 available at https://media.africaportal.org/documents/the_1969_OAU_Refugee_convention.pdf accessed on 08.10.2020

sprout on the continent during the liberation struggle. The 1969 OAU Convention complements the refugee definition set out in the 1951 Refugee Convention.²³ The 1969 OAU Convention defines a refugee further as a person who “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality”.²⁴

From an international perspective, Zambia has a responsibility and obligations to offer protection to every person whether citizens or non-citizens.²⁵ The State has the responsibility to protect the human rights of every person within its territory. This responsibility is however fettered by the principle of state sovereignty or the right of the state to regulate who can enter their territories.²⁶

2. Statement of the problem

Asylum seekers intending to seek international protection in or are traversing through Zambia, run a risk of being arrested and detained for immigration-related offences, this is usually due to the misapplication of immigration laws on asylum seekers.²⁸ As a result those who enter Zambia without any legal travel documents often end up being arrested, detained in prisons with convicted prisoners.²⁷ This is the State practice despite some of them being from countries that are notorious for producing refugees such as Somalia.²⁸

In 2017, more than 147 Ethiopians that had fled their home country for various reasons including seeking asylum, were detained for periods between one and five years and later returned to their home country.²⁹ These detentions are justified without proof by the State on grounds that some of the asylum seekers are militants who participate in the atrocities in the country of origin.³⁰ Immigration officials in Zambia have on several occasions been reported

²³ See n 20

²⁴ Article 1(2) of the 1969 OAU Convention

²⁵ *Défense des Droits de l’Homme v Zambia* 71/92, (2000) AHRLR 321 (ACHPR 1996)

²⁶ Francesca Pizzutelli, *The Human Rights of Migrants as Limitations on States’ Control Over Entry and Stay in Their Territory*, 2015 available at <https://www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/> accessed on 26/11/2019 at 9:26 hours

²⁸ *Alex Ruta v Minister of Home Affairs* (2018) ZACC 52 at para. 24

²⁷ Elizabeth Donger et al, *Refugee Youth in Lusaka: A Comprehensive review of health and wellbeing*, Harvard Centre for Health and Human Rights, 2017, p.43 available at <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2464/2018/05/UNHCR-ZAMBIA-Report1.pdf> accessed on 08.10.2020

²⁸ <https://www.lusakatimes.com/2018/06/17/136-foreign-nationals-arrested/> accessed on 13/01/2020 at 10:11 hours

²⁹ <https://www.lusakatimes.com/2017/02/01/iom-helps-ethiopian-migrants-detained-zambia-return-home/>

³⁰ <http://www.daily-mail.co.zm/militants-among-asylum-seekers/>

to arrest and detain foreign nationals including asylum seekers for unlawful presence.³¹ This problem is exacerbated by the misapplication immigration laws on asylum seekers by the authorities responsible for the enforcement of these laws. In the section that follows, the conflict between refugee law and immigration law is analysed in detail as a part of the problem for irregular entry for asylum seekers in Zambia.

3. An outline of applicable international and domestic laws

Currently, there is a conflict between international refugee law and domestic immigration legislation in Zambia, insofar as these relate to illegal entry of asylum seekers in the country. Zambia is a party to numerous international human rights instruments, notable *inter alia*, are the Universal Declaration of Human Rights UDHR,³² the African Charter on Human and Peoples Rights (hereinafter Banjul Charter),³³ the 1951 Refugee Convention and the 1967 Protocol, which Zambia ratified in 1969³⁴ and the 1969 OAU Convention.³⁵

Despite this immense participation in the international normative human rights framework, there are several pitfalls in the implementation and adherence to international refugee law as it applies to the ‘illegal entry or stay’ of asylum seekers. To appreciate this dichotomy, it is important to look at the applicable international and domestic laws. On the international plane, Article 31(1)³⁶ of the 1951 Refugee Convention provides for the protection of asylum seekers against criminal proceedings in the country of refugee for illegal entry. It provides as follows;

“[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

Further Article 33 of the same Convention is couched in a way that seeks to protect asylum seeker from being returned to their countries of persecution. It provides that;

³¹ <http://www.daily-mail.co.zm/immigration-arrests-97-foreigners/> accessed on 04.09.2019 at 09:30 hrs

³² UDHR in 1948.

³³ The Banjul Charter.

³⁴ 1951 Refugee Convention.

³⁵ 1969 OAU Convention on Refugees.

³⁶ Article 31(1) of the 1951 Refugee Convention

“[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.³⁷

The Refugees Act was enacted to bring Zambia’s domestic legislation in line with its international refugee commitments and repealing the 1970 Refugee (Control) Act.³⁸ In its preamble, the current Refugees Act provides in part that it domesticates the 1951 Refugee Convention.³⁹ Added to this, Section 11(1) of the Act which is in tandem with Article 31(1) of the 1951 Refugee Convention provides that;

“[a]n asylum seeker or a person who is within Zambia, whether that person has entered Zambia lawfully or otherwise, and wishes to remain in Zambia as a recognised refugee under this Act may, within seven days of entering Zambia, apply for recognition as a refugee to the Commissioner or an authorised officer”.⁴⁰

Additionally, the Refugees Act protects asylum seekers who are unlawfully present in accordance with Article 31(1) of the 1951 Refugee Convention, it provides that:

“[d]espite the provisions of Part V of the Immigration and Deportation Act, 2010, proceedings for unlawful entry or presence in Zambia shall not be instituted or continued against a person or a dependant of that person who enters or is present in Zambia without lawful authority if that person (a) without delay applies to an authorised officer for recognition as a refugee under section 11; or (b) has become a recognised refugee in accordance with this Act”⁴¹

Section 23(1) of the Act is also part of the protection mechanism against *refouler*, it provides that;

“[d]espite the provisions of any other law, a person shall not be refused entry into Zambia or be expelled, extradited or returned from Zambia to another country if that refusal, expulsion or return would compel that person to return to or remain in a country where—

³⁷ Article 33, See n 36

³⁸ Refugee (Control) Act, Chapter 120 of the Laws of Zambia.

³⁹ Preamble of the Refugee Act No. 1 of 2017

⁴⁰ Ibid, Section 11(1)

⁴¹ Ibid, Section 46

- (a) that person may be subjected to persecution on account of that person's race, religion, nationality, membership of a particular social group or political opinion; or
- (b) [t]hat person's life, physical well-being or liberty is threatened by external aggression, occupation, foreign domination or event seriously disrupting public order in part or the whole of that country".⁴²

A cursory perusal of section 23(1) reveals that using the words 'despite the provisions of any written law', the Refugees Act stands superior to the Immigration Act⁴³ and should be applied to all asylum seekers as a protection from refoulement.

Although, the rules applicable to persons who enter Zambia, either as transit asylum seekers or illegally or to seek asylum have been set by both international and domestic refugee law, the enforcement of the Immigration Act, which is the principle piece of legislation dealing with illegal immigrants creates a problem for asylum seekers. According to section 22 (1) of the Act; "[a]ny person who belongs to a class set out in the Second Schedule shall be a prohibited immigrant in relation to Zambia".⁴⁴

The schedule referred to in section 22(1) highlights *inter alia* the following groups of persons as to whom the section applies i.e., f) persons entering without proper travel documents and g) persons who fail to report to the immigration officer.⁴⁵ Therefore, according to this provision, any of the persons are deemed as prohibited immigrants and in breach of the provisions of the Act. Usually asylum seekers fall within category (f) and (g) above.

In addition to section 22(1), section 23(1) of the Act, gives power to the Immigration Department to expel any prohibited immigrant within the boundaries of the country, it provides that;

"[a]ny immigration officer may or, if so, directed by the Minister in the case of a person to whom subsection (2) of section twenty-two relates, shall by notice served in person on any prohibited immigrant require him to leave Zambia".⁴⁸

⁴² Section 23(1) of the Refugee Act

⁴³ Alex Ruta v Minister of Home Affairs (2018) ZACC 52 at para. 24

⁴⁴ Section 22(1) of the Immigration and Deportation Act

⁴⁵ See, n 46, Schedule to section 22(1)

⁴⁸ See, n 46, section 23(1)

The dilemma faced by most asylum seekers in Zambia emanates from a lack of harmonisation of Article 31 and 33 of the 1951 Convention, section 11(1) and 23(1) of the Refugees Act on one part with sections 22(1) and 23(1) of the Immigration Act. The Immigration Act ordains wide powers on the immigration department to detain or expel asylum seekers found flouting immigration laws as illegal immigrants. Once identified as such by the authorities, asylum seekers may either end up detained at remand prisons or being *refouler* to the very countries they seek protection from. This is a gross violation of human rights by a country so absorbed in the international human right's normative framework.

Zambia being party to the Banjul Charter have obligations to protect the rights of their nationals and non-nationals. There is, therefore, a continuing obligation on the part of the contracting States to secure the rights protected in Charter to all persons within their jurisdiction, national and non-nationals.⁴⁹

Owing to the above-mentioned reasons, it can be concluded that the Immigration Act needs to be reviewed. The Act should be amended to make provision excluding its application to persons seeking asylum. Further, that no asylum seeker should be detained, prosecuted or even *refouler* for breach of immigration laws. In the alternative, consideration could be given to adding a supremacy clause in the Refugees Act which could provide as follows; 'where there is any inconsistency between the Refugees Act and any other written law, the provisions of the Refugee Act will prevail to the extent of the inconsistency'. The effect of such a clause is that it trumps the Immigration Act in its application to asylum seekers.⁵⁰

4. Research objectives

The objectives of this research are to highlight the conflict between Article 31(1) of the 1951 Convention and sections 11(1) and 23(1) the Refugee Act No.1 of 2017 which domesticates the 1951 Convention and sections 22(1) and 23(1) of the Immigration Act. This work will make recommendations on how best to bridge the gap between international law and domestic law for Zambia to remain compliant to international obligations on the protection of refugee's human rights.

5. Research question

⁴⁹ Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia (2000) AHRLR 321 (ACHPR 1996).

⁵⁰ Henry Paul Monaghan, Supremacy Clause Textualism, 110Colum. L. Rev, 2010, p. 740

Article 31 of the 1951 Convention somewhat recognises that there may be justification for the use of false travel documents and irregular entry for purposes of seeking asylum, since a person fleeing human rights violations may need to resort to false travel documents or none to leave the country of persecution to travel to another country.⁵¹ The 1951 Refugee Convention underscores the rights of people in distress to seek protection even if their actions constitute a breach of domestic immigration laws in their countries of asylum.⁵² This work aims to answer the question ‘does the enforcement of the Immigration Act, conflicts with the 1951 Refugee Convention as domesticated by the Refugees Act in as far as arrest and detention for illegal entry of asylum seekers in Zambia is concerned’?.

6. Literature review

There is a plethora of literature that offers an interpretation of the non-penalisation clause. Article 31(1) of the 1951 Refugee Convention recognises circumstances when flight may lead to persons seeking asylum without possessing proper documentation, and therefore States are precluded from penalising asylum seekers for illegal entry.⁵³ It underscores the right of people in distress to seek protection even if their actions constitute a breach of domestic laws⁵⁴. Article 26 of the Vienna Convention mandates States to perform their treaty obligations in ‘good faith’.⁵⁵ This brings into the argument the aspect of State responsibility, which demands that States should not only observe the letter of the law but refrain from acts that may affect their treaty obligations.⁵⁶ States continue to narrowly interpret the 1951 Refugee Convention in a quest to divest themselves from international responsibility.⁵⁷ Fundamentally speaking illegal immigrants are those persons who enter the jurisdiction of another country without meeting the legal entry requirements.⁵⁸ Interestingly, international law prohibits States from imposing penalties on persons fleeing persecution from their home States.⁵⁹

“The UNHCR emphasises that a person who has a well-founded fear of persecution should be viewed *prima facie* as a refugee and not as an illegal immigrant and that their only means of survival should they escape persecution maybe via illegal entry or use of false

⁵¹ Richard Dustan, United Kingdom: Breaches of Article 31 of the 1951 Convention, 10 Int’l Refugee Law journal, 1998, p.205

⁵² Goodwin Gill and Jane McAdam, The Refugee in International Law, 2007, p.384

⁵³ Ibid, n 45 supra p. 384

⁵⁴ Ibid, n 52

⁵⁵ Ibid, n 52

⁵⁶ Ibid, n 52

⁵⁷ See, n 18 supra

⁵⁸ Janet Phillips, Asylum Seekers and Refugees: what are the facts? 2011, p.2

⁵⁹ Ibid, p.2

documents.”⁶⁰ There is no express provision mandating a claimant for asylum to have entered the country of asylum legally.⁶¹ Therefore, although countries like Zambia may justify the arrest asylum seekers who enter the country illegally,⁶² for security reason. One can argue that such claims may be a fear of the unknown. The reality in Zambia is that persons found illegally present are deemed as *prima facie* in breach of immigration laws as they are arrested and detained for lack of proper documentation.⁶³ This has led to detentions and in some instance *refouler*.⁶⁴ They have also used detention, discriminatory treatment, and denial of other human rights in their attempts to dissuade the refugee and asylum seekers.⁶⁵ Though a lot has been written about the protective mandate of the 1951 Refugee Convention under Article 31(1), in other jurisdictions especially Europe, little information is available in the African context. This research, therefore, seeks to add to already existing literature forming arguments from a Zambian perspective.

7. Research methodology

This research will be a scholarly piece of work and will focus on the review of literature touching on the interpretation of Article 31(1) and Article 33(1) of the 1951 Refugee Convention. It will also focus on international human rights treaties that Zambia is a party to in a quest to unveil the protection mechanisms that can be accorded to asylum seekers who irregularly enter the country in line with international standards of treatment for irregular entry. Part of the analysis will be on the protection gaps in the Refugees Act and the Immigration Act and other vital pieces of legislation. The internet will be used as a source of information from time to time.

8. Scope of the study

This research will mainly focus on the Article 31(1) and 33(1) of the 1951 Convention as domesticated by the Refugees Act and section 22(1) and 23(1) of the Immigration Act concerning unlawful arrests and protection from the refoulement for asylum seekers.

9. Overview of the chapters

⁶⁰ Ibid, p.3

⁶¹ Fatima Khan and Tal Scheier, *Refugee Law in South Africa*, 2015, p.24

⁶² James C, Hathaway, *The Rights of Refugees in International Law*, 2005, p.406

⁶³ See, n 30 *supra*

⁶⁴ See, n 30

⁶⁵ Guy S Goodwin-Gill, 'Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific' (2003) 24 *Immigr & Nat'lity L Rev* 329

Chapter one of this thesis introduces the elements of concern about Zambia's international obligations vis-à-vis the rights of asylum seekers based on an analysis of its current legislation, concerning Article 31(1) and Article 33(1) of the 1951 Refugee Convention. Chapter Two analyses the international and regional normative framework on the protection of asylum seekers for unlawful entry. The focus will be on various international human rights instruments. Chapter Three exposes the reader to Zambia's domestic legislation aimed at protecting the rights of asylum seekers in Zambia. It will then highlight the dichotomy between the Immigration Act and the Refugees Act. Chapter Four will draw the reader to the notion of State responsibility as it relates to State sovereignty and how these two principles conflict thereby exacerbating the violation of asylum seekers rights to enter upon and claim asylum in Zambia. Chapter Five will then make recommendations of the plausible measures that can be adapted to deal with the dilemma faced by most asylum seekers in Zambia.

10. Conclusion

It is clear from the above analysis that, though being in the centre of Southern Africa with a potential of hosting refugees from DRC, CAR, Burundi, Rwanda, Angola, Mozambique and Zimbabwe, the numbers of asylum seekers that flock to Zambia without a doubt reveal a gap in its protection of their human rights. This can be attributed to the enforcement of Immigration legislation, detention and deportation of asylum seekers. The *status quo* is fortified by the conflict between the Refugees Act and the Immigration Act in as far treatment of asylum seekers is concerned.

Chapter Two

International and African regional normative framework on the protection of rights for asylum seekers

1. Introduction

When States subscribe to international treaties, they agree to be bound by every provision in those treaties, except those that they have entered reservations on.⁶⁶ Therefore, there is a legitimate expectation that a State will uphold its part of the bargain by ensuring that those provisions to which no reservations have been entered are enforced. In the event of failure to do so, such a State should be deemed to have violated its international obligations. This chapter examines the normative framework on the protection of rights of refugees found to be unlawfully present in the host State. It will also expose how the non-penalisation clause in the 1951 Refugee Convention has been overlooked to the detriment of refugees on the enjoyment of other human rights such as those guaranteed under the ICCPR, ICESCR and the Banjul Charter. Article 31(1) of the 1951 Refugee Convention will be analysed in detail by bringing to the fore arguments in favour of the purposive interpretation in accordance with the provisions of the Vienna Convention on the Law of Treaties, looking at the *Travaux Préparatoires*, adopting a human rights perspective and focusing on the rights to dignity, equality and non-discrimination as the fundamentals of human rights law. This analysis will show that legislation criminalising the unlawful presence of refugees is in breach of Article 31(1) of the Refugee Convention.

2. A general categorisation of immigrants in international law.

To appreciate the exact beneficiaries of protection under Article 31(1) of the 1951 Refugee Convention, it is important to understand the international definition of an illegal immigrant and how illegal immigration should not be aligned to unlawful entry for purposes of seeking asylum. This is because illegal immigration is often confused with asylum seekers inherent rights to enter a foreign territory and seek protection therein as guaranteed under the UDHR.⁶⁷

⁶⁶ Marko Milanovic & Linos-Alexandar Sicilianos, Reservations to Treaties: An Introduction, *The European Journal of International Law* Vol 24 No.4, 2013, p.1058

⁶⁷ Article 14 of the UDHR

In contemporary migration academic literature, scholars use several terms and expressions to define illegal presence in a foreign State namely: ‘undocumented’, ‘paperless’, ‘illegal’, ‘unauthorized’, ‘with an irregular status’, ‘irregular’, ‘clandestine’, ‘quasi-legal migration’. These terms are either used interchangeably or as applicable to different groups of individuals.⁶⁸ This section focuses on three types of migrants namely; documented, undocumented and refugees.

2.1 Documented migrants.

Documented migrants are those who satisfy all the legal requirements of entry into a foreign territory such as visa or other entry permits. From a human rights perspective, one would argue that documented migrants should therefore be accorded the same treatment as nationals of the host State without discrimination, this is not always the case as their rights are usually diminished,⁶⁹ and accessing many of these rights remains only on paper.⁷⁰ Because they satisfy the minimum requirements of entry, documented migrants are deemed as valuable to the host State,⁷¹ due to the fact that they bring with them skills, capital, and knowledge and engage in self-remunerated activity which can create employment.⁷²

2.2 Undocumented migrants

According to the International Organisation for Migration (IOM), an undocumented migrant is “a non-national who enters or stays in a country without the appropriate documentation”.⁷³ This includes, among others: a person (a) who has no legal documentation to enter a country but manages to enter clandestinely, (b) who enters or stays using fraudulent documentation, (c) who, after entering using legal documentation, has stayed beyond the time authorized or otherwise violated the terms of entry and remained without authorisation”.⁷⁴ Undocumented migrants are persons who violate immigration laws and to whom the enforcement of domestic

⁶⁸ Ivan A. Aleshkowski, *Illegal Immigration as a Structural Failure of Global Development* (Globalistics and Globalization Studies, 2013), p. 245

⁶⁹ Laura Thompson, *Protection of Migrant Rights and State Responsibility* available at https://www.iom.int/files/live/sites/iom/files/about-iom/docs/DDGs_commentary_Protection_of_Migrants.pdf accessed on 04.08.2019 at 15:36 hours

⁷⁰ SPII and OASIS, *Access to Socio-Economic Rights for Non-nationals in the SADC*, 2012, p.2

⁷¹ Ibid, pp109-111

⁷² OHCHR, *The Economic, Social and Cultural Rights of Migrants in an irregular situation*, 2014, p.4 available at https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf accessed on 24.07.2019 at 12:56 hours

⁷³ International Organisation for Migration, *World Migration Report*. 2018, p.86 available at https://www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf (accessed on 18.06.2019 at 09:17)

⁷⁴ Magdalena Perkowska, *Illegal, Legal, Irregular or Regular: Who is The Incoming Foreigner? Studies of Logic, Grammar and Rhetoric* (University of Blalystock, 2016), p.191

immigration laws should apply.⁷⁵ Refugees and asylum seekers *prima facie* fall outside this category of migrants.

2.3 Refugees and Asylum seekers

According to the UNHCR Handbook, the term refugee or asylum seeker applies to any person who fulfils the 1951 Refugee Convention definition of a refugee whether they have gone through the status determination process.⁷⁶ From this backdrop, because refugees and asylum seekers are protected by a set of instruments unique to themselves, it can be argued that immediately they cross the international territory of the host State with the intention to seek protection, they should be deemed as legally present and subject to the same treatment as other migrants similarly placed, in this case, documented migrants.

3. Background and purpose of Article 31(1) of the 1951 Convention.

According to the Vienna Convention on the Law of Treaties (hereafter the Vienna Convention) States have the obligation to interpret the provisions of the international instruments to which they are a party in ‘good faith’ in accordance with the ordinary meaning to be given to the terms according to its ‘object and purpose’.⁷⁷ Additionally, the Vienna Convention prescribes that recourse may be had to the “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”.⁷⁸ Therefore the *Travaux Preparatoires* of the Article 31(1) of the 1951 Refugee Convention must be analysed to be able to determine its intended object and purpose.⁷⁹

A cursory perusal of the *Travaux Preparatoires* reveals that the preamble of the 1951 Refugee Convention may have been premised on ensuring the fundamental rights and freedoms for asylum seekers as provided under the UDHR.⁸⁰ As regards Article 31(1), the preparatory work shows that it was widely debated upon before it could be agreed on how the provision was to be phrased.

The lengthy deliberations could be attributed to the fact that the provision was not in tandem with the principle of State sovereignty as it limited the States’ power to regulate illegal

⁷⁵ See, n 6 *supra*

⁷⁶ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued January 1992 and December 2011), para 28

⁷⁷ Article 31 of the Vienna Convention

⁷⁸ See, n 77, Art. 32

⁷⁹ <https://www.unhcr.org/uk/protection/globalconsult/59afed607/34-article-31-1951-convention-relating-status-refugees-dr-cathryn-costello.html>

⁸⁰ Paul Weis, *The Refugee Convention: The Travaux Preparatoires Analysed with Commentary*, 1990, p.32

entry for asylum seekers and other migrants. Most national domestic immigration legislation conflicts with Article 31(1) because, unlike its object of non-penalisation, national laws still generally criminalise illegal entry for all immigrants including asylum seekers.⁸¹ Most domestic immigration legislation does not have clear provisions protecting asylum seekers from penalisation,⁸² creates a source of legislative challenges for States and often places asylum seekers in the dilemma of being arrested and detained for unlawful entry and in most cases *refouler*.⁸³ The preparatory work further reveals that Article 31(1) was intended to immune asylum seekers whether lawful or unlawfully present in the State of asylum from being held to be in breach of immigration laws and or removal from the host State.⁴⁶

Article 31(1) also provides that States ‘[s]hall not impose penalties’, on account of their illegal entry or presence, on refugees provided that they are ‘coming directly’ from a territory where their life or freedom was threatened and they present themselves ‘without delay’ to the authorities and show ‘good cause’ for their illegal entry or presence.⁴⁷ Therefore the non-penalisation effect of Article 31(1) comes into play if a refugee meets the conditions of directness, promptness and a good cause.⁴⁸

To purposively interpret Article 31(1) and bring out its full meaning and effect, it is important to look at its key elements, including a) no penalties for illegal entry; b) coming directly; c) without delay, and d) show good cause. The first element adopts the word ‘shall’ not impose penalties can be interpreted to mean that there is an unequivocal demand for State parties not to impose any penalties for illegal entry on any asylum seeker. This is a *carte blanche* provision for any person who enters the territory of another State with the sole purpose of seeking protection for the 1951 Refugee Convention reasons. The Federal Constitutional Court of Germany found that Article 31(1) “applies to asylum-seekers in a non-technical sense, including those who have not yet formally applied for asylum, but have entered Germany with the intention to seek asylum at the earliest possibility”.⁴⁹

Further, Article 31(1) sets conditions for the enjoyment of immunity in the sense that a refugee must be coming directly from the State of persecution. This requirement is often

⁸¹ See, n 46, Section 38

⁸² The Second Schedule to section 35 of the Immigration and Deportation Act. See categories F and G.

⁸³ UN News Service, UN agency urges Zambia to halt deportation of refugees, 13 April 2010, available at: <https://www.refworld.org/docid/4bc80c731e.html> [accessed 12 October 2020]

⁴⁶ See, n 80, p. 202

⁴⁷ Article 31(1) of the 1951 Convention

⁴⁸ Cathryn Costello et al, Article 31 of the 1951 Convention Relating to the Status of Refugees, University of Oxford, 2017, p. 10

⁴⁹ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany)

narrowly interpreted during the status determination process in most States⁵⁰ and arguments have been exacerbated by the provision of the Dublin Convention,⁵¹ requiring refugees to seek protection in the first State of refuge.⁵² However, the asylum seeker does not require to be coming directly from their country of persecution provided they can show that their life and safety could be at stake if they remained in the first or second country.⁵³ The UK courts have interpreted the directness condition as applying to a refugee regardless of how many countries they have traversed to get to the State in which they now seek protection.⁵⁴

The third requirement is that asylum seekers must promptly avail themselves to the authorities of the host State. Because of the circumstances in which they leave their countries of origin, refugees often face a dilemma in meeting this requirement. "Refugees are persons that have fled regimes that violated their human rights, unlawfully detained them and/or tortured them. When in the host state they are negotiating massive obstacles in order to live in those countries".⁵⁵ This is because they often must travel long distances, as far away as they can from their national border to avoid being persecuted or returned to their States once discovered to be unlawfully present.⁵⁶ There is a general distrust for authorities⁵⁷ in the host State and national laws often stipulate the required time frame within which asylum seekers should avail themselves and failing which they are deemed as illegal immigrants and subject to immigration laws. For example, Zambia's Refugees Act gives any person intending to seek asylum in Zambia to do so within days (7) of entering the country.⁵⁸ Although additional protection for unlawful presence is offered under the Refugees Act,⁵⁹ the qualification for such protection is that an asylum seeker should present themselves without delay before a recognised officer.⁶⁰ On the other hand, the Immigration Act gives powers to an immigration officer to arrest any person who enters without documentation and or fails to present themselves before

⁵⁰ Aleinikoff, T. Alexander. "State-Centered Refugee Law: From Resettlement to Containment." *Immigration and Nationality Law Review*, 14, 1992, p. 187

⁵¹ <https://www.refugeecouncil.org.uk/information/resources/> accessed on 7/01/2020 at 17:34 hours

⁵² <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A41997A0819%2801%29> accessed on 25/11/2019:08

⁵³ Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees*, 2008, p.9

⁵⁴ *R v Uxbridge Magistrate Ex Parte Adami* [1999] EWHC Admin 765; [2001] Q.B. 667

⁵⁵ Tricia Hynes, *New Issues in Refugee Research, The Issues of trust and distrust in research with refugees: choices, caveats and considerations for research*, School of Health and Social Sciences, Middlesex University, 2003, p.13

⁵⁶ See, n 92 Ex parte Adami

⁵⁷ See, n 76

⁵⁸ Section 11 of the Refugees Act

⁵⁹ Ibid, Sec 46

⁶⁰ Ibid, Sec 46(a)

an immigration officer.⁶¹ It is with this backdrop for example that UK courts have reiterated that no strict time can be applied to this requirement and each case must be dealt with on its own merits.⁶² Though seemingly fair, the reality, however, is that the authorities in most States tend to narrowly interpret the time element under Article 31(1) leading criminalisation for illegal entry. This gives them the power to arrest and detain refugees based on breach of immigration laws which is a violation of human rights and breach of international law.⁶³ The UN Working Group on Arbitrary Detention has argued that ‘criminalising illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention.’⁶⁴ It can be argued that the detention of refugees for illegal entry can be avoided by adopting a human rights approach to the interpretation of Article 31(1). This can help to deal with the unnecessary expenditure by the State for taking care of asylum seekers in detention and in some instances facilitate their *refouler* and channel the limited State resources to other needy sectors in society. The purpose of refugee law can be summarised as follows “to offer protection for genuine refugees fleeing persecution, to ensure reasonable treatment of refugees in the host States and to protect refugees from the imposition of criminal penalties for breaches of the law reasonably necessary given their circumstances”.⁶⁵

Lastly, the asylum seekers must show good cause as to why they have entered the host State illegally. This requirement has been said to play a limited role as it can be satisfied by a lack of valid travel documents.⁶⁶

Despite the emphasis on a purposive interpretation of Article 31(1), most States tend to narrowly interpret it to the detriment of asylum seekers.⁶⁷ In Zambia for example asylum seekers are immediately subjected to the penalties under immigration laws if they do not present themselves to the authorities within the legally stipulated time frame. Because illegal entry is a strict liability offence, asylum seekers are usually held in detention for long periods of time without access to justice, legal representation under inhuman and degrading conditions all in breach of international as well as domestic law guaranteeing these rights.⁶⁸

⁶¹ See n 48

⁶² Cathryn Costello, Article 31 of the 1951 Convention Relating to the Status of Refugees, University of Oxford, 2017, p.4

⁶³ Ibid, n 100, p. 8

⁶⁴ Ibid, n 100 p. 8

⁶⁵ R v Asfaw [2008] UKHL 31

⁶⁶ Cathryn Costello et al, Article 31 of the 1951 Convention Relating to the Status of Refugees, University of Oxford, 2017, p. 31

⁶⁷ Ex parte Adami, See n 84

⁶⁸ Ibid, n 3 supra

The protection mechanisms cannot be limited to Article 31(1) of the Refugee Convention because in its preamble the instrument is set to adopt a human rights approach, it recognises that the United Nations Charter (hereinafter the UN Charter) and the UDHR have affirmed that all human beings shall enjoy fundamental rights without discrimination and that the United Nations (hereafter the UN) has shown profound concern for refugees and asylum seekers and endeavours to guarantee their rights.⁶⁹

It is therefore imperative to consider the provisions in other international human rights instruments which seek to protect and uphold the facets of human rights namely dignity, equality and non-discrimination in relation to the non-penalisation clause.

3.1 Supplementary protection-international and regional human rights instruments from Article 31(1) of the Refugee Convention perspective.

Apart from the 1951 Refugee Convention, obligations to protect the rights of asylum seekers can be established from other binding international human rights instruments such as the 1966 human rights covenants namely the ICCPR and ICESCR together with the Protocols thereto and regional treaties.⁷⁰ International human rights law has become a primary source of refugee law, while the 1951 Refugee Convention plays a supplementary role.⁷¹

The ICCPR, ICESCR, Convention on the Rights of the Child (hereinafter CRC) and regional instruments such as the 1969 OAU Convention, Banjul Charter African Convention on the Rights and Welfare of the Child (hereinafter African Children's Charter) and the African Charter on Human and People's Rights of Womxn in Africa (hereinafter Maputo Protocol) and General Comments all form part of the supplementary protection mechanisms for refugees and asylum seekers. This section adopts a human rights approach to decipher the international human rights regime available to reinforce Article 31(1) of the Refugee Convention, the focus will be on the hard and soft law regimes available for the protection of refugee found unlawfully present in Zambia.

Zambia being a member of the United Nations had through the UN Charter in 1945 pledged its faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and womxn and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of

⁶⁹ Preamble of the 1951 Refugee Convention

⁷⁰ James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p 119

⁷¹ Maria- Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulment to Residence and Citizenship*, *Refugee Survey Quarterly*, 2015, p.14

international law can be maintained and to promote social progress and better standards of life in larger freedom.⁷² As a State Party, it also agreed to uphold the principles of sovereignty, independence and non-interference in the domestic affairs of each State party.⁷³

Although not expressly providing for any formal protection of refugees found unlawfully present, the UN Charter is the tone-setter in the international human rights protection regimes.⁷⁴ It recognises the equal rights and worth of all persons including refugees and asylum seekers. Therefore, the interpretation of the preamble could arguably be that UN Charter does recognise their fundamental rights and promotes equality of all human beings.⁷⁵ This can be interpreted and enforced as part of the international legal regime reinforcing the non-penalisation clause. The UN Charter also places a duty on States parties to any international instruments to uphold their end of the bargain after ratifying international human rights instruments.

The preamble of the UN Charter has been recognised under various human rights instruments particularly the ICCPR and ICESR and is, therefore, a part of the international human rights protection mechanism. The human rights spirit of the UN Charter is somehow conflicted by its principle of State sovereignty,⁷⁶ which has to a large extent been used to interpret laws in a manner that is detrimental to the protection of refugees and asylum seekers human rights.

Modern-day refugee protection mechanisms go beyond the 1951 Refugee Convention, according to the UNHCR Executive Committee, States have an obligation “to take all necessary measures to ensure that refugees and asylum seekers are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on asylum seekers protection”.⁷⁷ For asylum seekers, relying on additional protection mechanisms for their human rights means more protection than that which is accorded to them under the 1951 Refugee Convention.⁷⁸

a. The right to seek and enjoy asylum

⁷² Preamble of the UN Charter

⁷³ Article 2 of the UN Charter

⁷⁴ Ibid, n 111

⁷⁵ Ibid, n 111

⁷⁶ Article 2(1) of the UN Charter

⁷⁷ UNHCR Executive Committee Conclusion No. 81, “General Conclusion on International Protection” (1997), at para. (e), available at <https://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html> accessed on 26.07.2019 at 12:17 hours

⁷⁸ James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p 120

“The refugee protection has its origins in general principles of human rights. The inclusion of ‘the right to seek and to enjoy asylum from persecution’ in Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places international refugee law within the human rights paradigm. Moreover, reference in the preamble to the 1951 Refugee Convention, the UDHR and ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ confirms that international refugee law was not intended to be seen in isolation from human rights law”.⁷⁹

b. Liberty, security of person and freedom from torture

The ICCPR came into force in 1976 and contains provisions that can be interpreted in favour of Article 31(1) of the 1951 Refugee Convention. In its preamble, it recognises the equality and inalienability of rights of every human being.⁸⁰ It also protects everyone from being deprived of their liberty and security of person from arbitrary detention and arrest.⁸¹ Asylum seekers usually fall within the category of vulnerable persons and thus are subjected to all forms of human rights abuses.⁸² Article 7 protects everyone from being subjected to torture, cruel and inhuman and degrading treatment.⁸³ Through its General Comment No. 20, the Human Rights Committee interprets this provision as aiming to protect the dignity and mental integrity of every individual. When asylum seekers are detained for illegal presence they must be treated with humanity and respect for their inherent dignity. The State is duty bound to protect against acts of State and non-State actors in breach of Article 7.⁸⁴

This is contrary to the treatment of asylum seekers in Zambia who are often detained in prisons.⁸⁵ This is all in breach of the above provision and the international standards of treatment of prisoners.⁸⁶

c. Access to justice, free fair and impartial tribunals

⁷⁹ Alice Edwards, *Human Rights, Refugees and the Right to Enjoy Asylum*, Oxford University Press, 2005, p.297

⁸⁰ Preamble of the ICCPR

⁸¹ *Ibid*, Article 9

⁸² General Comment 21

⁸³ *Ibid*, n 118, Article 7

⁸⁴ General Comment 20 of the Human Rights Committee on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)

⁸⁵ UN High Commissioner for Refugees (UNHCR), *Progress Report 2018: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers & Refugees, 2014 - 2019*, February 2019, available at: <https://www.refworld.org/docid/5c9354074.html> [accessed 12 October 2020]

⁸⁶ Rule 1 of the Nelson Mandela Rules

“If detained, asylum seekers must have access to prompt court review of the State’s detention decision. Independent court review is essential to ensure that detention is not arbitrary and is conducted in accordance with international law. That review must be effective, not merely *pro forma*, and must include a genuine inquiry into the necessity of detention”.⁸⁷ It is an express obligation on the part of the State to inform the person arrested and detained the reasons for such detention and to bring them before a competent court within a reasonable time. Although the law provides for the right to have access to courts,⁸⁸ the practice in Zambia is that asylum seekers are subjected to administrative procedures with the Minister having a final say.⁸⁹ Though merely persuasive to courts in Zambia, the decision in the case of *Torres v Finland*, the Committee found that an asylum seeker’s detention violated Article 9, which “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence” The Committee found that the Finnish procedures, which provided for appeal through an administrative process to the Minister of the Interior, were inadequate.⁹⁰

d. Equal protection before the law and legal representation

The right to equality before the law is guaranteed to every person charged with a criminal offence,⁹¹ for this reason the Executive Committee notes that every person should have access to legal representation. “The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”⁹² While asylum seekers have the right to engage the services of qualified legal representatives at their own costs.⁹³ Due to the circumstances under which they flee their habitual place of residence, refugees often find themselves without any financial resources to afford legal representation should they be arrested for unlawful entry.¹³³ This stifles their opportunity to get fair trials before independent and impartial tribunals. States are encouraged

⁸⁷ Goodwin Gill et al, *The Refugee in International Law*, 2007, p518

⁸⁸ Section 40(1) of the Refugees Act

⁸⁹ U.S. Committee for Refugees and Immigrants, *World Refugee Survey*, 2008 para. 7 available at <https://www.refworld.org/docid/485f50ddc6.html> accessed on 02.08.2019 at 11:41 hours

⁹⁰ *Torres v Finland* No. 291/1988, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, U.N. Doc. A/44/40 (1990)

⁹¹ Article 14 of the ICCPR

⁹² General Comment No. 32 available at https://www.ohchr.org/Documents/Issues/IJudiciary/Communications/OL_SRB_1_2018.pdf

⁹³ UN High Commissioner for Refugees (UNHCR), *UNHCR RSD Procedural Standards Unit 2.7: Legal Representation in UNHCR RSD Procedures*, 26 August 2020, available at: <https://www.refworld.org/docid/5f3114a74.html> [accessed 12 October 2020]

¹³³ See, n 132

to provide free legal aid in other cases, for asylums seekers who do not have sufficient means to pay.⁹⁴ The need for available legal representation for refugees will be discussed in detail in the next chapter.

e. Non-discrimination in the enjoyment of rights

Every person is entitled to equal protection before the law without discrimination.⁹⁵ The use of the word ‘every person’ denotes the inclusion of asylums seekers. “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”⁹⁶ Each contracting State undertakes in Article 2(1) to ensure the rights in the Covenant “to all individuals within its territory and subject to its jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁹⁷ While nationality is not included in this illustrative list, it has been determined to be embraced by the residual category of “other status”.⁹⁸ From this backdrop, it can be argued that where a State breaches Article 31(1) of the 1951 Refugee Convention, there could be a possible breach of the above provisions in the ICCPR as they are all anchored on freedom from arrest and detention and the protection of human rights from a universality perspective. The State practice of non-observance of the provisions set out above hampers the enjoyment of other socio-economic rights for refugees or access thereof as set out under the ICESCR.

f. Enjoyment of social-economic rights

The claim for rights contained in the ICESCR may not be as straight forward as one would expect due to the progressive realisation of these rights.⁹⁹ In its preamble, the ICESCR recognises the principles set out in the UN Charter for the respect of the dignity and worth of all human beings.¹⁰⁰ Detention for unlawful presence may lead to deprivation of asylums seekers accessing their social-economic rights and therefore a violation of the treaty by a State

⁹⁴ See, n 131, GC No. 32

⁹⁵ Article 26 of the ICCPR

⁹⁶ General Comment No. 18 para 1

⁹⁷ See, n 135, Article 2

⁹⁸ James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p 120

⁹⁹ Christof Hayns and Danie Brand, Introduction to socio-economic rights in the South African Constitution, p.154 available at <http://www.saflii.org/za/journals/LDD/1998/9.pdf> accessed on 31.07.2019 at 14:29 hours

¹⁰⁰ Preamble of the ICESCR

party.¹⁰¹ According to the 2016 National Human Rights report, the immigration department officers in Zambia raided religious and other places of assembly and detained suspected undocumented migrants including asylums seekers before thorough investigation.¹⁰²

g. Social Economic rights guaranteed to refugees

The ICESCR protects the right to family,¹⁰³ work,¹⁰⁴ adequate standard of living,¹⁰⁵ and enjoyment of the highest standards of mental health.¹⁰⁶ States should, therefore, ensure that their obligations under the ICESCR are met through legitimate refugee status determination processes. This is because the circumstances giving rise to forced migration often result in irregular presence leading to detention in the country of asylum,¹⁰⁷ asylums seekers are usually faced with high levels of mental and physical stress and illnesses and are usually unable to avail themselves to authorities within the legally prescribed times.¹⁰⁸ This leads to breaching domestic immigration legislation which has detention and possibly deportation as a sanction, leading to them being sheltered in prisons without access to basic health care and other services required to lead a dignified life.¹⁰⁹

Article 2 reminds States to take necessary measures to put in place legislation to protect the rights contained in the Covenant without discrimination,¹¹⁰ on the grounds set out including ‘other status’ which has been interpreted as including refugees status.¹¹¹ From the point of view of the State, provision of socio-economic rights is a controversial topic and one would argue that States will normally enforce immigration laws for unlawful presence as a quick fix scheme thereby reducing the burden on their national resources for those claiming access to socio-economic rights and instilling fear in those that may wish to seek asylum thereby constructively turning them away.¹¹²

¹⁰¹ Luka M. Muntingh, The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia, African Criminal Justice Reform, 2017, p5 available at <https://acjr.org.za/resource-centre/se-impact-2017.pdf> accessed on 02.08.2019 at 12:11 hours

¹⁰² United States Department of State, 2016 Country Reports on Human Rights Practices - Zambia, 3 March 2017, available at: <https://www.refworld.org/docid/58ec899f13.html> accessed 31 July 2019

¹⁰³ Article 10 of the ICESCR

¹⁰⁴ Ibid, Article 6

¹⁰⁵ Ibid, Article 11

¹⁰⁶ Ibid, Article 12

¹⁰⁷ See n 76 supra

¹⁰⁸ See n 76

¹⁰⁹ Section 56 of the Immigration and Deportation Act

¹¹⁰ Ibid, Article 2(1) and (2) of the ICESCR

¹¹¹ See n 137 supra

¹¹² Ophelia Field and Alice Edwards, Alternatives to Detention of Asylum Seekers and Refugees, UNHCR 2006, p. 1 para 2 available at <https://www.refworld.org/pdfid/4472e8b84.pdf> accessed on 12.10.2020

Zambia is a party to all the above instruments and has continuing obligations to ensure that they are enforced in good faith.¹¹³ Apart from the aforementioned instruments, recourse for protection of refugees found unlawfully present may be had to other regional instruments such as the 1969 OAU Convention, the Banjul Charter, the Maputo Protocol and the African Children's Charter.

4. African regional normative framework protecting refugees against arrest for unlawful entry.

The 1969 OAU Convention was the first human rights-focused instrument on the protection of refugees in Africa, this was preceded by the African Charter, the African Children's Charter and the African Maputo Protocol.¹¹⁴ This section will focus on the key provisions under the above-mentioned instruments that can be interpreted as a part of the enforcement mechanisms to protect asylum seekers found unlawfully present in Zambia.

Although being the key refugee protection instrument, the 1969 OAU Convention falls short of addressing some of the key issues faced by asylum seekers on the continent.¹¹⁵ However, it somehow places open ended responsibilities on States to protect the rights of asylum seekers within their territories. Article 2 places a responsibility on State in their best endeavours consistent with their respective legislations to receive asylum seekers and to secure the settlement of those who are unable or unwilling to return to their country of origin or nationality.¹¹⁶ This provision takes care of the special legal problems which asylum seekers all over the world and especially in Africa normally encounter,¹¹⁷ including unlawful presence in the host State, to be provided with basic life necessities, not subjected to cruel, inhumane and degrading treatment and not be discriminated against with regards access to justice and protection of the law.¹¹⁸

To complement the shortfalls of the 1969 OAU Convention on the protection of asylum seekers from arrest and detention for unlawful presence, the African Commission reiterates that one must not only look at it in isolation but should consider the Banjul Charter and other

¹¹³ See, n 77 supra

¹¹⁴ Gina Bekker, The Protection of asylum seekers and refugees with African regional human rights systems, 13 AHRLJ, 2013, p.1

¹¹⁵ Oyelade O.S, Critique of the rights of refugees under the OAU Convention Governing the Specific Aspects of Refugees Problems in Africa, 6 ISIL Year-Book of Int'l Humanitarian and Refugee Law, 2006, p.221

¹¹⁶ Article 2 of the 1969 OAU Convention

¹¹⁷ See n 155 p.221

¹¹⁸ Ibid, n 155, p.224-225

international human rights instruments.¹¹⁹ This can be said to be true even as it applies to the 1951 Refugee Convention. This section seeks to establish a nexus between provisions of the African regional human rights instruments and Article 31(1) of the 1951 Refugee Convention.

a. Responsibility on States to regulate in respect for human rights

Article 1 of the Banjul Charter and the African Children's Charter provides that State parties shall recognise the right, duties and freedoms contained in the Charter and shall adopt legislative measures to give them effect.¹²⁰ Therefore, States have the responsibility to repeal laws that may be in breach of these and other human rights instruments.

b. The Right to seek and enjoy asylum

The right to seek asylum is protected under the Banjul Charter (Article 12(3)),¹²¹ African Children's Charter (Article 23)¹²² and Maputo Protocol (Articles 10 and 11)¹²³ which all seek to provide protection for refugees when persecuted in accordance with the laws of the host country. Both the African Children's Charter and the Maputo Protocol, are in acknowledgement of the fact that up to 80 per cent of the world's asylum seekers population is comprised of women and children.¹²⁴ They also set out specific obligations incumbent on State parties with regard to these two groups that is to assist unaccompanied children in accessing refugee status determination processes and protecting women from all forms of violence and exploitation.¹²⁵ This right can only be realised if States enact national laws to that effect and forthwith stop subjecting refugees found unlawfully present to immigration laws.¹²⁶

c. Right to enjoyment of first- and second-generation rights without discrimination

The three African human rights instruments contain civil and political as well as socio-economic rights which are guaranteed to both citizens and non-citizens of member States, save for participation in political and public service.¹²⁷ Article 2¹²⁸ of the Banjul Charter and Maputo

¹¹⁹ Jamil Ddamulira Mujuzi, The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights, 9 AHRLJ, 2009, p.161

¹²⁰ Article 1 of the African Charter and African Children's Charter

¹²¹ Article 12(3) of the African Charter

¹²² Article 23 of the African Children's Charter

¹²³ Article 10&11 of the Maputo Protocol

¹²⁴ Gina Bekker, The Protection of asylum seekers and refugees with African regional human rights systems, 13 AHRLJ, 2013

¹²⁵ See, n 164

¹²⁶ Alex Ruta v Minister of Home Affairs (CCT02/18)

¹²⁷ Gina Bekker, The Protection of asylum seekers and refugees with African regional human rights systems, 13 AHRLJ, 2013, p.3

¹²⁸ Article 2 of the African Charter and Maputo Protocol

Protocol, Article 3¹²⁹ of the African Children's Charter protects every person from discrimination based on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. These provisions are all encompassing and includes the protection of asylum seekers rights and supplement protection offered under Article 31(1) of the 1951 Refugee Convention.

5. Conclusion

It is unequivocally clear that the protection of the rights of refugees and asylum seekers can not only be deemed as being limited to the 1951 Refugee Convention but extends to a plethora of international human rights instruments as partially demonstrated above. The 1951 Refugee Convention can be reinforced by looking at provisions in these human rights instruments and giving them a wide interpretation. Therefore, any breach of the provisions of the 1951 Refugee Convention is by extension a breach of international human rights law. It is important for States that still have provisions criminalising illegal entry of asylum seekers to revisit those laws and bring them in tandem with international law. Asylum seekers should be deemed as *prima facie* lawfully present in the territory of the host State whether they have adhered to the requirements under Article 31(1) of the Refugee Convention.

¹²⁹ Article 3 of the African Children's Charter

Chapter Three

Protection of asylum seekers for unlawful entry under Zambia's domestic legislation.

1. Introduction

The States' obligation to be bound by an international legal instrument is dependent on whether they have entered reservations on certain provisions of a treaty or on whether the State is a monist or a dualist jurisdiction. This section discusses the Zambia mode of domestication of international law. As part of the protection mechanism on non-penalisation for unlawful entry, the Constitutional provisions will form part of the discussion, it will then expose how the Refugees Act has domesticated the 1951 Refugee Convention and fortify the argument that it is bound without limitations to the non-penalisation clause under international refugee law and breach of which violates the Constitution and international law. It will then highlight some of the provisions under the Immigration Act and bring to the fore arguments on how these pieces of legislation conflict with the Constitution, Refugee Act and the 1951 Refugee Convention on illegal entry with respect to asylum seekers. With the backdrop of domestic law protecting asylum seekers in Zambia, this analysis will extend to other African jurisdictions to demonstrate the similarities or difference if any in national refugee and immigration laws. A conclusion could be that the Immigration Act does not apply to asylum seekers.

2. Domestication of the 1951 Refugee Convention

The relationship between international law and domestic law can be explained through the principles of monism and dualism.¹³⁰ Monism refers to a system where international law and domestic law are viewed as a single system of law.¹³¹ Dualism on the other hand refers to a parallel system between international law and domestic law. In a dualist legal system, international law is viewed as governing relations between States whereas domestic laws

¹³⁰ G. Ferreira and A Ferreira-Snyman, Incorporating Public International Law into Municipal Law and Regional Law against the background of the dichotomy between monism and dualism, Potchefstroom Electronic Law Journal, Vol 17, ISS. 4, 2014, p.1471

¹³¹ See, n 170, p1471

govern the rights and obligations of individuals within that State.¹³² Ratification of an international instruments does not make it part of domestic law in a dualist jurisdiction,¹³³ therefore, the need for such an instrument to be incorporated and made part of domestic law a process referred to as domestication.¹³⁴ Zambia is a dualist jurisdiction, meaning that for an international instrument to have force and effect, it will need to be domesticated through an Act of Parliament.¹³⁵ The Refugees Act has incorporated the 1951 Refugee Convention into Zambia's domestic legislation, in its preamble, the Act makes reference to domesticating both the 1951 and 1969 Refugee Conventions¹³⁶ making it binding on the national legal system.

3. Legislation protecting asylum seekers against sanctions for unlawful entry in Zambia

This section will focus on Zambia's domestic laws which can be interpreted as a part of protection mechanisms of asylum seekers found to be unlawfully present in Zambia. The Constitution of Zambia, Refugee Act, Legal Aid Board Act and the Human Rights Commission Act will form the main point of focus of the discussion.

3.1 The Constitution

Zambia's Constitution has since attaining independence in 1964, gone through several amendments.¹³⁷ The first was in 1973 when it was amended to introduce the one-party State, this was later revisited in 1990 to revert to multi-party politics leading to the 1991 Constitution.¹³⁸ In 1996 the Constitution was again amended to provide for an effective Bill of Rights, promote the democratic principles of regular and fair elections, transparency and accountability, and to guard against the re-emergence of a dictatorial form of governance.¹³⁹ Most recently in 2016, the Constitution was amended and at the time of this research in 2019, there are attempts to amend the Constitution yet again.¹⁴⁰ During the last amendment process, the country went through a national referendum to amend the part of the Constitution which

¹³² Ololade O. Shyllon, *Monism/Dualism of Self Executory: The application of Human rights Treaties by Domestic Courts in Africa*, Institute of Human Rights, Abo Akeademi University, 2009 p.6

¹³³ See, n 172, p.6

¹³⁴ Chongo Chitupula, *A Country overview: Zambia*, 'The administration of refugees in Zambia', Presentation paper on Refugee Status Determination and Rights of Refugees in Southern and East Africa, 2010, p.3

¹³⁵ <https://www.nyulawglobal.org/globalex/Zambia.html> accessed on 26.06.2019 at 15:41

¹³⁶ See preamble of the Refugees Act of No.1 2017

¹³⁷ Muna B. Ndulo and Robert B. Kent, *Constitutionalism in Zambia: Past, Present and Future*, Journal of African Law, Vol. 40, No. 2, (School of Oriental and African Studies, 1996), p.269

¹³⁸ Ibid, p.269

¹³⁹ Ibid, p.271

¹⁴⁰ Bill No. 10 of 2019
<http://www.parliament.gov.zm/sites/default/files/documents/bills/The%20Constitution%20of%20Zambia%20%28Ameement%29%20Bill%202019.pdf> accessed on 27/11/2019 at 10:08 hours

encompasses the bill of rights but failed to pass the vote, for that reason the country has a parallel Constitutional system with the Bill of Rights still sitting in Part III of the 1991 Constitution.¹⁴¹ In this analysis, both documents will be used as a point of reference.

Through the preamble of the 2016 Constitution amendment, the country upholds the fundamental freedoms for every person and not just its citizens. This declaration is made considering the Constitution proclaims Christian norms and recognition of the Almighty God as the Supreme Being.¹⁴² The basic tenets of Christianity are that one must love their neighbour just as themselves and to do unto them as one would expect.¹⁴³ For a country which proclaims Christianity, the treatment of asylum seekers who are found unlawfully present paints a different picture as a good number are arrested and detained for irregular presence in the country.¹⁴⁴ Asylum seekers and refugees are not treated based on the Christian values¹⁴⁵ even though these are individuals who have fled their homes not by will but due to persecution and in hope of finding safety in Zambia.¹⁴⁶

Article 1 makes the reading of the supremacy of the Constitution and that any law inconsistent with it is void. The Constitution shall bind every person, institutions and organs of the State. Article 8 sets out the national values and principles and provides thus; morality and ethics; human dignity, equity, social justice, equality and non-discrimination among others.¹⁴⁷ These national values apply to the interpretation of this Constitution, enactment and interpretation of the law and development and implementation of State policy.¹⁴⁸ Through this Constitution, the country upholds the basic human rights tenets of dignity, equality and non-discrimination and posits that these will form the basis for enacting and interpretation of legislation and development of State policy. It is through the lens of this Constitution that one can argue that the Immigration Act fails to uphold these values and the Bill of Rights as laid down in the Constitution in so far as treatment of asylum seekers found to be unlawfully present is concerned.

Part III of the 1996 Constitution contains the Bill of Rights, there are several provisions that can be interpreted as offering protection to asylum seekers and reinforcing Article 31(1) of the 1951 Refugee Convention. Article 11 “recognises and declares that every person in Zambia

¹⁴¹ See Part III of the 1991 Constitution of Zambia-Bill of Rights

¹⁴² Preamble of the Constitution of Zambia as amended in 2016

¹⁴³ Holy Bible, Mark 12:30-31, New International Version. Biblical Inc, Hodder & Stoughton, 2012

¹⁴⁴ See, n 62 *supra*

¹⁴⁵ UNHCR, Beyond Detention: A Global Strategy to support governments to end detention of asylum seekers and refugees 2014-2019, p. 75

¹⁴⁶ <https://www.unhcr.org/news/latest/2017/10/59d3418d4/zambia-faces-crisis-thousands-flee-violence-drc.html>

¹⁴⁷ Article 8

¹⁴⁸ Article 9 of the Constitution as amended

shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this [p]art, to each and all of the following, namely life, liberty, security of the person and the protection of the law.”¹⁴⁹

Article 13(1) protects the right to personal liberty and provides that no person shall be deprived of their personal liberty except maybe authorised to prevent unlawful entry. One of the instances listed under Article 13(1) which infringes Article 31(1) of the 1951 Refugee Convention is that the restriction of personal liberty may be required for purposes of preventing the unlawful entry of that person into Zambia.¹⁵⁰ This is a very interesting Constitutional provision considering Zambia’s international obligations on the protection of asylum seekers. It is such provisions of the law that give immigration authorities power to arrest and detain asylum seekers found to be unlawfully present. Part of the protection requires that every person detained due to the reasons set out above should within a reasonable time be brought before the court for his cause to be heard.¹⁵¹ Contrary to this requirement the practice is that no one asylum seeker has been taken to court for unlawful entry, they are simply arrested, detained for lengthy periods of time and in due course deported via administrative procedures. Till today and despite this being a rampant problem for asylum seekers, the courts in Zambia are yet to pronounce themselves on cases involving asylum seekers found unlawfully present in the country, a search at the High Court and Subordinate Court Registries reveal that no litigation had the time of writing been instituted on behalf of asylum seekers found unlawfully present.

It is trite human rights law that no person should be subjected to inhuman, cruel and degrading treatment. This is an internationally applauded human right and is reaffirmed under Article 15 of the Constitution.¹⁵² The Convention against Torture defines torture or inhuman and degrading treatment as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of punishing him for an act he committed or intimidating or coercing him, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹⁵³

Zambia does not have any designated refugee detention centres, therefore asylum seekers found to be unlawfully present in the country are detained in prisons together with

¹⁴⁹ Article 11 of the 1996 Constitution

¹⁵⁰ Ibid, Article 13(1)(i)

¹⁵¹ Ibid, Art. 13(3)

¹⁵² Ibid, Article 15

¹⁵³ Article 1 of the Torture Convention

convicted felons. The mere exposure of asylum seekers to such kind treatment falls within the definition of torture under the Article 1 of the Torture Convention as prison exposes asylum seekers to hardships and poor conditions of living which are sometimes worse off than the reasons for their fleeing.

There is a Constitutional obligation under Article 18(1)¹⁵⁴ placed on immigration officials who arrest and detain asylum seekers to within a reasonable time usually 48 hours bring them before the courts of law and accord them a fair hearing before an independent and impartial tribunal.

As highlighted in Chapter Two the principle of non-discrimination is one of the main facets of international human rights law. The Constitution of Zambia under Article 23 protects every person from discrimination based on race, tribe, sex, place of origin, marital status, political opinions colour or creed, whereby persons of similar characteristics are subjected to restrictions to which persons of another such description are not made subject.¹⁵⁵

Within itself, Article 23 has some derogations which are to the disadvantage of asylum seekers with respect to protection from discrimination. Article 23(1) provides that subject to clauses 4, 5 and 7, no law shall make provision which is discriminatory either of itself or effect. Further sub-article 2 provides that subject to clauses 6, 7 and 8, no person shall be treated in a discriminatory manner by any person acting by any written law or in the performance of the functions of any public office or any public authority. Clauses 4 and 7 make interesting reading, Clause 4 provides that Clause 1 shall not apply to any law if that law makes provision (b) with respect to persons who are not citizens of Zambia.¹⁵⁶ The literal interpretation of this clause is that it applies to asylum seekers and hence fortifies the provisions under the Immigration Act. This, however, is an incongruity as refugees should only be subjected to refugee law and not immigration law.¹⁵⁷ Further Clause 7 provides that “[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed under the Constitution”.¹⁵⁸ Therefore the arrest and detention of asylum seekers based on unlawful entry as proscribed by the Immigration Act is seemingly justified by these Constitutional provisions. The Constitution seems to be offering protection

¹⁵⁴ Article 18

¹⁵⁵ Article 23(3)

¹⁵⁶ Article 23(4)(b)

¹⁵⁷ See n 211 supra

¹⁵⁸ Article 23(7)

to asylum seekers on a literal reading of Article 23 with one hand but taking away that protection under the same provision with the other hand. These double standards are what courts in Zambia need to interpret so that there is clarity on the treatment of asylum seekers found unlawfully present and which laws they should be subjected to.

“In line with UNHCR Detention Guidelines, ‘detention’ refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.”¹⁵⁹ Article 26 of the Constitution proscribes detention and requires any person detained to be within a reasonable time but not exceeding 14 days furnished with a statement in a language that he understands, be brought to justice before an impartial tribunal and should have access to legal representation.¹⁶⁰ In reality, therefore, asylum seekers who are found to be unlawfully present are left exposed to detention for extended periods of time. In contravention of Article 31(1) of the 1951 Refugee Convention, illegal entry is an offence under the Immigration Act and access to the asylum procedure in detention is problematic due to a strict application of the law which indicates that “all refugees should present themselves at the port of entry to be issued with a permit”.¹⁶¹

Although persons in detention have a right to legal representation and should be informed of this right by arresting officials, legal advice is not readily available as the Legal Aid Board who can provide free legal representation have limited resources and in practice, only those facing the most serious charges, usually in the High Court, tend to be able to obtain representation.¹⁶²

Lastly, Article 28 makes provision for every person’s right to seek redress before the High Court where any of the rights contained under the Constitution are about to or have been violated,¹⁶³ the use of the words ‘every person’s’ can be argued to generally extend to asylum seekers found unlawfully present.

3.2 Refugees Act No.1 of 2017

The main piece of legislation protecting the plight of asylum seekers in Zambia is the Refugees Act. The preamble of the Refugees Act provides that it as an Act to establish the Commission

¹⁵⁹ UNHCR, Beyond Detention, A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019, p.8

¹⁶⁰ See, n 189, Article 26

¹⁶¹ See section 11 of the Refugee Act

¹⁶² <https://acjr.org.za/resource-centre/challenging-disadvantage-in-zambia-people-with-psychosocial-and-intellectual-disabilities-in-the-criminal-justice-system> p.18

¹⁶³ Article 28

for Refugees, provide for the recognition, protection and control of refugees, provide for the rights and responsibilities of refugees, establish a refugee fund and domesticate the 1951 Refugee Convention and its Protocol and the 1969 OAU Convention.¹⁶⁴ With this preamble, the country has, therefore, accepted the obligations under international law for the protection of the rights of refugees and asylum seekers including Article 31(1), save for those it has entered reservations on and is not bound by.

Section 11 of the Act provides that “[a]n asylum seeker or a person who is within Zambia, whether that person has entered Zambia lawfully or otherwise, and wishes to remain in Zambia as a recognised refugee under this Act may, within seven (7) days of entering Zambia, apply for recognition as a refugee to the Commissioner or an authorised officer”.¹⁶⁵ Although Section 11 is that it provides a limited period within which a person should present their claim for asylum, an asylum seeker who is unlawfully present should in an effective legal system benefit from the provisions under Section 46 which protects them from legal proceedings for unlawful entry.¹⁶⁶ Despite the protection mechanisms under the Refugees Act, the application of immigration laws over the aforementioned provisions on asylum seekers could lead to arrest and detention for unlawful presence.¹⁶⁷ The seven (7) days requirement may not be enough for an asylum seeker who’s fleeing persecution and has a general distrust for authorities in the host State.¹⁶⁸ In reality, asylum seekers will usually be unable to present themselves within the seven (7) days period, would have breached the immigration laws and therefore illegally in the country and ineligible to seek protection under section 46 of the Refugees Act and Article 31(1) of the 1951 Refugee Convention.

Secondly, although Section 46 claims superiority over Part V of the Immigrations Act, asylum seeker found to be illegally present, may be subject to either the Immigration Act or the Refugees Act depending on what the authorities decide. Asylum seekers like Juveniles have a specific piece of legislation enacted to apply and protect their rights. Therefore, where a person shows the intention of claiming asylum in Zambia the law applicable is the Refugees Act and not the Immigration Act as is usually the case.

The interface between refugee law and immigration law was tested by the Constitutional Court of South Africa which is a common-law jurisdiction in the case of *Alex Ruta v Minister of Home Affairs*. In this case, “[a]t issue was the reach of the Refugees Act and of the

¹⁶⁴ Preamble of the Refugees Act No.1 of 2017

¹⁶⁵ Section 11(1) of the Refugee Act (Zambia)

¹⁶⁶ Section 46 of the Refugees Act offers the same protection as Article 31(1) of the 1951 Refugee Convention

¹⁶⁷ See n 185 supra

¹⁶⁸ *R v Uxbridge Magistrate Ex parte Adami* [1999] EWHC Admin 765; [2001] Q.B.

Immigration Act as well as the interplay between these two statutes; the effect of delay on entitlement to apply for refugee status.”¹⁶⁹ “Should a person who claims to be a refugee and expresses an intention to apply for asylum be permitted to apply under the Refugees Act or should they be dealt with as an illegal foreigner under the Immigration Act?”¹⁷⁰

“The applicant, Mr Alex Ruta, is a Rwandan national who entered South Africa unlawfully contrary to the terms of the Immigration Act and he was, therefore, an illegal foreigner. Before the Constitutional Court, Mr Ruta argued that immigration officials are obliged to allow him to apply for asylum once he expresses an intention to do so. He argued that allowing immigration officials to bar him from applying under the Refugee Act is, contrary to that statute, a usurpation of the duties and powers of a refugee status determination officer (RSDO). Mr Ruta contended further that the Department’s barring him from applying also undermines his constitutional rights to human dignity, life and freedom and security of the person.”¹⁷¹

“In response, the Minister argued that Mr Ruta could have and should have applied for asylum much sooner to comply with the legislation. The Minister also contended that the Immigration Act was the primary statutory vehicle for managing illegal foreigners and that it is under this statute that the status of asylum claimants who have not yet applied for asylum and have not secured protection under the Refugees Act is to be determined.”¹⁷²

“The question is this: should an “illegal foreigner” who claims to be a refugee and expresses an intention to apply for asylum be permitted to apply in accordance with the Refugees Act instead of being dealt with under the Immigration Act?”¹⁷³

The above judgement should be celebrated as it cures important defects in the application of refugee and immigration laws. Firstly, it deals with legislative supremacy and pronounces that when dealing with the plight of refugees in whatever circumstances, the refugee law and not immigration law should apply. Secondly that refugees should not be excluded from applying for asylum simply because they have been found to have breached immigration laws. Because immigration laws criminalise illegal entry, asylum seekers refugees may often be denied the opportunity to apply for asylum because they would have breached

¹⁶⁹ Alex Ruta v Minister of Home Affairs Case CCT02/18, para 3

¹⁷⁰ Constitutional Court media brief available at <http://www.saflii.org/za/cases/ZACC/2018/52media.pdf> -

¹⁷¹ Ibid, n 211

¹⁷² Ibid, n 211

¹⁷³ Ibid, n 211, para 14

immigration laws due to failure to present themselves within the legally stipulated period. The State practice is often to apply immigration laws over refugee law, and this may lead to denial of legitimate claims for asylum and detention in breach of both domestic and international law.

The above analysis demonstrates that though there are efforts on the part of the state to uphold its responsibility under international law on the non-penalisation of refugees unlawfully present, the law seems to protect refugees with one hand and punish with the other as the enforcement depends entirely on the choice of law and the interpretation given to those laws by authorities.

Section 14 is another provision that though seemingly protecting the rights of asylum seekers. It provides that “[t]he Commissioner shall exclude a person or asylum seeker from the recognition of refugee status under this Act “if there are reasonable grounds to believe that the person or asylum seeker has before that person’s entry into Zambia transited through one or more countries and is unable to show reasonable cause for failure to seek asylum in those countries”.¹⁷⁴ A similar provision was interpreted in the case of *R V Uxbridge Magistrate Ex parte Adami*, where the court held that Article 31(1) protects the rights of refugees or asylum seekers from sanctions for illegal presence despite the fact that they have transited through various countries.¹⁷⁵

The Commissioner for Refugees in Zambia can deny recognition as a refugee on grounds that an asylum seeker should have sought asylum in the first country of refuge,¹⁷⁶ but in doing so should consider varying personal security or other reasons which could trigger the need to seek asylum elsewhere.¹⁷⁷ This is the dilemma that most refugees from Somalia find themselves in as they traverse several States including Kenya, Tanzania, and Malawi and Zambia.

3.3 The Legal Aid Board Act as amended by Act No.19 of 2005

The Legal Aid Board Act is another important piece of legislation which should protect the plight of asylum seekers arrested and detained for unlawful presence in Zambia. The right to legal representation is recognised under most international human rights instruments as well as under the Constitution of Zambia. Because of financial constraints, asylum seekers are usually not able to procure legal services but can instead obtain such services through the national legal

¹⁷⁴ Section 14(1) and (3) (c)

¹⁷⁵ *R v Uxbridge Magistrate Ex Parte Adimi* [1999] EWHC Admin 765; [2001] Q.B. 667, para 19

¹⁷⁶ See, n 217

¹⁷⁷ UNHCR, A guide to international refugee protection and building state asylum systems, 2017, p.80 available at <https://www.unhcr.org/3d4aba564.pdf> accessed on 14.10.2020

aid systems. According to the preamble of the Legal Aid Act, the objective of the Act is to “provide for the granting of legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to engage practitioners to represent them”.¹⁷⁸

Section 10(3) of the Act provides that any person charged with an offence may apply for legal aid whether the application has been refused by the court. The courts have a duty to inform every person brought before them of their right to legal representation through legal aid. The problem, however, is that where a matter involves asylum seekers found unlawfully present in the country, there is little or no chance that the case might go before any competent court or tribunal as there is limited access to courts and or legal representation due to costs or generally a lack thereof.¹⁷⁹ Cases on the unlawful presence of asylum seekers may be dealt with administratively,¹⁸⁰ with the Minister having a final say on the plight of asylum seekers.

The other problem with granting legal aid to asylum seekers could be that their cases involve the State departments usually the immigration authorities and have financial ramifications if taken before a competent tribunal, which may order for compensation against the State for false imprisonment or unlawful arrest and detention. The operations of the Legal Aid Board are funded by the State and it’s near impossible to procure an institution which benefits from State coffers to seek justice on behalf of persons that are deemed *prima facie* liability on the State.¹⁸¹

In its Seventh National Development Plan for the period from 2017 to 2021 and National Vision 2030, Zambia has committed itself to improve access to justice for all.¹⁸² This translated into the development of the National Legal Aid Policy in 2018 which is anchored on national values as laid down under the Constitution of human dignity, social justice and inclusiveness. In these premises, the objective of the National Legal Aid Policy is to ensure access to legal representation for all vulnerable persons in society. Vulnerable persons are defined as to include asylum seekers.¹⁸³ Part of the mandate of the National Legal Aid Policy is that it places a duty on all law enforcement agencies to inform any person charged in the criminal justice system of their right to legal aid whether they can afford it.¹⁸⁴ With no cases being taken to court on behalf of refugees and asylum seekers by legal aid counsel, it is clear

¹⁷⁸ Preamble of the Legal Aid Act, Chapter 34 of the Laws of Zambia

¹⁷⁹ See, n 204 supra

¹⁸⁰ Section 15 of the Refugee Act

¹⁸¹ National Legal Aid Report 2017, available at http://internationallegalaidgroup.org/images/miscdocs/ILAG_2017_National_Report_-_Zambia_-_Mr_Charles_Dinda.pdf accessed on 14.10.2020

¹⁸² Ministry of Justice, National Legal Aid Policy, 2018, p.1

¹⁸³ Ibid, n 224 , p.8

¹⁸⁴ Ibid, p.13

that this is a mere policy document that may not have a real impact for the section of society it is meant to protect.

3.4 The Human Rights Commission Act

The Human Rights Commission (HRC) is established under the Act as an autonomous body not subject to the control and direction of any authority.¹⁸⁵ The HRC is the institution that is better placed to deal with and protect the rights of asylum seekers in Zambia because it is mandated to investigate violations of human rights, investigate maladministration of justice, and propose effective measures to prevent human rights violations. It can also visit prisons and other places of detention with the view of assessing and inspecting conditions of the persons held in such places and make recommendations to address existing problems.¹⁸⁶ The Act further ordains a number of powers on the HRC which include receiving complaints from aggrieved persons, associations and other individuals reporting on behalf of aggrieved persons, it can also issue a summons requiring the attendance of any person in authority requiring them to produce any document or record on a particular question and to recommend a punishment of any person in authority for violating of human rights.¹⁸⁷ The HRC can also recommend that a person in detention is released and that such person seeks redress before the courts of law.¹⁸⁸

The downside to the efficacy of the HRC is first that the Commissioners according to section 5(2) are appointed by the President subject to ratification by National Assembly. This brings to the fore a question on whether the Commissioners are autonomous in carrying out their duties.¹⁸⁹ The powers and functions of the Commissioners set out above are enough to protect the rights of asylum seekers in detention for unlawful presence and therefore, enforcing Article 31(1) of the 1951 Refugee Convention. It can summon prison authorities, immigration officers, police officers, UNHCR and the Commissioner for Refugees for purposes of carrying out investigations on asylum seekers in detention and can make recommendations for their release.

¹⁸⁵ Section 3 of the Human Rights Commission Act

¹⁸⁶ Ibid Section 9

¹⁸⁷ Ibid, Section 10(2)

¹⁸⁸ Ibid, Section 10(4)

¹⁸⁹ Annie Chew-Chanda, Promoting the effectiveness of democracy protection institutions in Southern Africa THE COMMISSION FOR INVESTIGATIONS AND THE PERMANENT HUMAN RIGHTS COMMISSION IN ZAMBIA, p.29 available at <https://www.eisa.org/pdf/rr43.pdf> accessed on 14.10.2020

4. Zambia's legislation violating Article 31(1) of the 1951 Convention

The above analysis sought to bring to the fore some of the laws in Zambia that can be interpreted as reinforcing the non-penalisation clause under the 1951 Refugee Convention. It is worth noting that, the reasons why arrests and detention of asylum seekers occur in Zambia is partly because the country has entered reservations on the freedom of movement as provided under Article 26.¹⁹⁰ As a result, numerous cases of arrests and detentions of asylum seekers have been reported owing to the country's encampment policy.¹⁹¹ This section analyses the provisions under the Immigration Act and with respect to dealing with asylum seekers found unlawfully present. It will form the argument that this piece of legislation should not be applicable to asylum seekers, but other migrants because asylum seekers are only subject to the Refugees Act.

4.1 Immigration and Deportation Act No.18 of 2010

The Immigration Act has gone through several reforms, with the most recent amendment under Act No. 19 of 2016. In its preamble the Act sets out its objective as to consolidate the law relating to immigration, to promote a human rights-based approach and culture in respect of immigration controls, create an environment of cooperation with other public institutions and promote integration of functions and harmonisation of operations among public institutions controlling borders and activities related thereto.¹⁹²

There are two important elements that stand out from the objectives of the Act namely the adoption of a human rights-focused approach and cooperation between the immigration department with other institutions dealing with border controls. These institutions would for the purposes of this research include the Commissioner for Refugees under the Ministry of Home Affairs, UNHCR,¹⁹³ Prison Service, the Police and the HRC. Therefore, the application and interpretation of the provisions under the Act should focus on the protection of human rights and promotion of joint efforts with other government entities dealing with immigration including those dealing with asylum seekers who may be classified as prohibited immigrants.

A prohibited immigrant is defined under section 35(1) as “any person who belongs to a class set out in the Second Schedule and shall not qualify for a visa, any temporary residence

¹⁹⁰ See, n 200, p. 76

¹⁹¹ <https://www.unhcr.org/afr/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html> accessed on 20.10.2020

¹⁹² Preamble to the Immigration Act

¹⁹³ See, n 233, p. 73

permit, residence permit or admission, in any other manner, to Zambia”.¹⁹⁴ The law is specific on the exclusion of prohibited immigrant from being granted admission in Zambia. For asylum seekers, this may be exacerbated by the 7 days required for one to present themselves for determination.¹⁹⁵ Therefore, where an asylum seeker is found to be unlawfully present, they often fall under the category of persons deemed as prohibited immigrants and denied the right to seek asylum.¹⁹⁶ Subsection 3 provides that “the presence within Zambia of any prohibited immigrant shall be unlawful and such person shall be arrested without warrant, detained and deported from Zambia in accordance with this Act”.¹⁹⁷ The second schedule referred to under section 35(1) lists any of the following as prohibited immigrants:

Class E

“[a]ny person, not being the holder of a valid permit to remain in Zambia, who is likely to become a charge on the Republic in consequence of the person's inability to support the person's self and any of the person's dependants in Zambia and to provide for the removal of the person's self and such dependants from Zambia”.¹⁹⁸

Class F

“[p]ersons entering without proper travel documents, visitors who are likely to be a charge on the Republic or who contravene this Act. Any person appearing before an immigration officer on entering Zambia, who is of the apparent age of sixteen years or more and who, on demand by the immigration officer, fails to establish that the person is the holder of a valid passport”.¹⁹⁹

Class G

“[p]ersons who fail to report to an immigration officer on entering Zambia. Any person entering Zambia who is required under section eleven to appear before an immigration officer and who fails to comply with the provisions of that section”.²⁰⁰

Because of the circumstances under which they leave their countries of residence, asylum seekers usually travel without any valid travel documents and are likely to be a charge on the State due to their inability to support themselves. Despite the protection offered for unlawful entry,²⁰¹ due to the lack of valid travel documents, asylum seekers will usually be

¹⁹⁴ Section 35(1) of the Immigration and Deportation Act No.18 of 2016

¹⁹⁵ Section 11 of the Refugees Act

¹⁹⁶ Seen, n 237

¹⁹⁷ Ibid, Ss (3) n 35

¹⁹⁸ Section 35-Second schedule

¹⁹⁹ Ibid, second schedule

²⁰⁰ Section 35-Second schedule of the Immigration and Deportation Act no.18 Of 2016

²⁰¹ See, n 238, Section 46

unable to present themselves before immigration officials, therefore found to be in breach of immigration laws.²⁰²

The other source for refugee problems found unlawfully present in Zambia is under Section 9 of the Act which provides that “[a] person entering Zambia, whom an immigration officer suspects to have committed an offence under this Act, shall give that person's name and address and any national document of identity to an immigration officer on request”.²⁰³ Subsection (2) further provides that “[a]n immigration officer may, without a warrant, arrest any person referred to in subsection (1) if that person refuses or fails to furnish, or gives false information of, that person's name and address to the immigration officer”.²⁰⁴ This means that an immigration officer has the power to arrest any person without a warrant provided that they are suspected of being illegally present. This power ordained on immigration officials is bound to be abused to the detriment of asylum seekers whose unlawful presence is protected under international law and the Refugees Act.

The Act under Section 11 provides for the requirements for one to enter Zambia, it restricts entry into Zambia through any undesignated ports of entry. It further provides for the legal documents to enter Zambia and proscribes any person without such documents from entering the country. It is, therefore, an offence under the Act for any person to be found present in Zambia without valid travel documents.²⁰⁵ Although offered protection for unlawful entry under the Refugees Act,²⁰⁶ the non-application of the provisions therein in consideration for immigration laws lead to arrests and detentions.²⁰⁷ Asylum seekers often leave their countries during a state of turmoil and no authority may be willing to grant travel documents to persons who want to seek asylum or refugee status in other countries and do not often have the luxury of obtaining travel documents to enable them to travel legally.²⁰⁸ This makes it near impossible for them to meet this requirement under the Immigration Act. It is now settled international law that asylum seekers should not be penalised for possession of invalid travel documents or unlawful presence without any such documents.²⁰⁹ This provision is, therefore, inapplicable to asylum seekers as *stricto-sensu* immigration law is non-binding on refugees or any person who shows the intention to seek asylum.

²⁰² See, n 241

²⁰³ Ibid, Section 9(1)

²⁰⁴ Ibid, Ss(2) n 35

²⁰⁵ Ibid, Section 11(1) (2) & (3)

²⁰⁶ Ibid, Section 46

²⁰⁷ See, n 233

²⁰⁸ R v Uxbridge Magistrate Ex parte Adami [1999] EWHC Admin 765; [2001] Q.B. 667

²⁰⁹ See n 250

The power to arrest, detain and deport any person from Zambia vests in immigration officers as provided under section 18 of the Act which states that “[a]n immigration officer may, without a warrant, arrest or cause to be arrested an illegal immigrant and detain that immigrant pending that immigrant's removal or deportation, in a manner prescribed and at a prescribed place of detention”.²¹⁰ The person arrested and detained shall be informed of the reasons for the detention and shall not be held for a period exceeding 30 days without an order of the court.²¹¹ The law is clear on the requirements for prolonged detention. A person detained should be brought before the courts of law which should pronounce itself on his detention. The reality on the ground, however, is that the periods of detention and postconditions, asylum seekers are detained for periods longer than 30 days without any recourse to the courts or legal representation despite that being expressly provided for under both international human rights law and national law.²¹²

Section 38 brings to the fore the nature of the powers of immigration authorities with regards suspected prohibited immigrants. It provides that “[i]f an immigration officer has reasonable grounds to suspect that any person is a prohibited immigrant, the officer may detain the person for a reasonable period, not exceeding fourteen days, as may be required for the purpose of making inquiries relating to that person”.²¹³ This period is reasonable for bona fide asylum claims for purposes of determining the reasons why such person is within Zambia and allowing them to seek asylum. However, asylum seekers are detained for longer periods than prescribed by law under inhuman and degrading conditions in violation of their human rights as are protected law.²¹⁴

Lastly, section 49 prohibits illegal immigrants from sojourning freely within Zambia, its states that “[a]n illegal immigrant shall not be exempt from a provision of this Act or be allowed to sojourn in Zambia on the grounds that the immigrant was not informed of those facts or that the immigrant was admitted or allowed to remain in Zambia through error or misrepresentation, or because the immigrant was undiscovered.”²¹⁵

The above is an analysis of some of the key provisions under the Act which causes problems for refugees who are found unlawfully present in Zambia. The immigration authorities rely on the provisions of this Act to arrest and detain asylum seekers.²¹⁶ Although

²¹⁰ Section 18(1) of the Immigration and Deportation Act

²¹¹ Ibid, Section 18(2)

²¹² See, n 124, p.76 *supra*

²¹³ Ibid, Section 38

²¹⁴ See, n 234 *supra*

²¹⁵ Ibid, Section 49

²¹⁶ See, n 32 *supra*

the Act states in its preamble that it adopts a human rights approach to dealing with immigration matters, one would wonder how the imposition of strict penalties for unlawful entry such as arrest and detentions in deplorable prison conditions on asylum seekers is in tandem with the protection of human rights. The lack of coordination between the immigration department, UNHCR and the Commissioner for Refugees, police and prison services can be attributed to the reported cases of arrests and detention of asylum seekers.²¹⁷

5. Comparative study of immigration and Refugee legislation in Lesotho and South Africa.

In most African States the patterns of enforcement of immigration and refugee laws are somewhat similar. An analysis of the laws in Ghana, Malawi, South Africa and Zambia reveals that there is a conflict between these two pieces of legislation.²¹⁸ This section seeks to analyse the immigration and refugee laws in Lesotho and South Africa from which a conclusion will be drawn on the best course of action for changing the *status quo* for the laws in Zambia to protect asylum seekers found unlawfully present.

5.1 Lesotho's Refugee Act 1983 and the Aliens Control Act of 1966

5.1.1 Refugees Act of 1983

Refugees who flee to Lesotho are protected by the non-penalisation clause under the Refugees Act. Section 9 of the Act provides that:

“[s]ubject to Section 7, and notwithstanding anything contained in the Aliens Control Act, 1966, a person claiming to be a refugee within the meaning of Section 3(1), who has illegally entered or is illegally present in Lesotho shall not;

(a) [b]e declared a prohibited immigrant;

(b) [b]e detained; or

(c) [b]e imprisoned or penalised in any other way, only by reason of his illegal entry or presence pending the determination of his application for recognition as a refugee under Section 7”.²¹⁹

²¹⁷ See, n 258

²¹⁸ Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, 2001, p.14

²¹⁹ Section 9 of the Refugee Act 1983(Lesotho)

5.1.2 Aliens Control Act 1966

Section 38 of the Aliens Control Act 1966, is harmonised with the Refugees Act and the 1951 Convention, it provides that “[i]f any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien is a refugee within the meaning of such a treaty or convention shall not be refused entry into or sojourn in Lesotho, and shall not be expelled from Lesotho in pursuance of the provisions of this Act except with his consent or except to the extent that is permitted by that treaty or convention, subject to any reservation that may be in force at the material time”.²²⁰

Lesotho has a double protection regime for asylum seekers who are found to be illegally present both under the refugee and immigration laws. These two pieces of legislation have been reconciled and therefore asylum seekers are fully protected under both regimes. In the case of Zambia, the lack of harmonisation between Article 31(1) of the 1951 Convention and most State immigration laws demonstrates how this conflict places refugees in a dilemma of being detained despite the protection guaranteed under international refugee law and domestic refugee legislation. Immigration authorities proactively enforce immigration laws and pay little or no attention to refugee legislation which should specifically apply to refugees.²²¹

5.2.South Africa’s Refugee Act and Immigration and Deportation Act 13 of 2002

5.2.1. Refugees Act No. 130 of 1998

The South African Refugee Act also makes clear provision for the non-penalisation for illegal entry. Section 21(4) of the Act provides that:

“[n]otwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if- (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4”.²²²

5.2.2. Immigration Act 13 of 2002

The Immigration Act 13 of 2002 provides that “[w]ithout the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective

²²⁰ Section 38(1) of the Aliens Control Act 1966(Lesotho)

²²¹ See, n 213 supra

²²² Section 24(4) of the South African Refugee Act

of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General”.²²³

The courts in South Africa have had the occasion to pronounce themselves on these provisions of the law.²²⁴ Therefore, it is now possible to read into these two pieces of legislation a conclusion that asylum seekers are only subject to the refugee law. This is not the case in Zambia where courts are yet to pronounce themselves on the dilemma of asylum seekers found unlawfully present.

6. Conclusion

There are several laws in Zambia that may be interpreted in favour of asylum seekers who are found unlawfully present in the territory. The Constitution upholds human rights and provides for the enactment and interpretation of laws from a human rights perspective by ensuring dignity, equality and non-discrimination for all. The Refugees Act, Legal Aid Board Act and the Human Rights Commission Act are some of the laws that are clearly available to protect the rights of asylum seekers.

These pieces of legislation may not be perfectly moulded to cater for such protection but can be broadly interpreted for that purpose. Therefore, it can be argued that in order to deter the influx of asylum seekers, immigration law and not refugee law may be applied on asylum seekers found unlawfully present in Zambia, leading to them being arrested, detained and deported. As the above legislative analysis will show, immigration law is designed to deal with any illegal migrants whether they are seeking international protection or not. The application of immigration law on asylum seekers is a misdirection because they are only subject to refugee law.

Although unlawful presence is a criminal offence under immigration legislation, asylum seekers are never taken through the criminal justice system but are dealt with administratively and in Zambia the Minister having a final say. The application of immigration laws on any person who shows the intention of claiming asylum is a miscarriage of justice and a violation of human rights.

²²³ Section 34(1) of the Immigration Act 13 of 2002

²²⁴ *Lawyers for Human Rights v Minister of Home Affairs and Others* Case CCT38/16, para 48

Chapter Four

State responsibility to protect asylum seekers and State sovereignty

1. Introduction

The recognition of States under international law implies responsibilities and obligations for which there are international sanctions. According to the Articles on international responsibility, “[e]very internationally wrongful act of a State entails the international responsibility of that State”.²²⁵ “There is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to it under international law and constitutes a breach of an international obligation of the State”.²²⁶ This obligation emanates from the general principle of international law of *pacta sunt servanda* that is, performance in good faith.²²⁷ Therefore, a State can be said to have failed to uphold its responsibility if it is in breach of international law.²²⁸ These breaches may be committed by a State’s internal institutions, this would include acts by entities and persons exercising governmental authority and by persons acting under the direction or control of the State such as the police, immigration authorities and the military.²²⁹ This responsibility is owed to both citizens and non-citizens including asylum seekers and refugees.²³⁰

The questions around the principles of State responsibility and State sovereignty as they relate to the reception and protection of asylum seekers or refugees are not new.²³¹ Those who argue in support of State responsibility contend that sovereignty includes the obligation to protect and respect the dignity and basic rights of all the people within the State.²³² Refugee

²²⁵ Article 1 of the Responsibility of States for internationally wrongful acts. Available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed on 18/11/2019 at 10:24 hours

²²⁶ Ibid, n 267, Article 2

²²⁷ Article 26 of the Vienna Convention on the Law of Treaties

²²⁸ <https://www.britannica.com/topic/international-law/The-responsibility-of-states>

²²⁹ Ibid, n 267

²³⁰ *Rencontre Africaine pour la Défense des Droits de l’Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996), it was held the “State parties must secure the rights protected by the instrument to everyone within their jurisdiction whether nationals or non-nationals”.

²³¹ Catharine Phuong, Identifying state responsibilities towards refugees and asylum seekers available at <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF> accessed on 16.08.2019 at 14:15 hours

²³² Gareth Erans and Mohamed Sahnoun, The Responsibility to Protect, Council on Foreign Relations, Vol. 81, No. 6 (Nov. - Dec2002), pp. 99-110 available at

law and policy therefore, offers remedial, palliative or surrogate protection to those whose rights are not protected in their own countries and ensures that those rights are protected in the country of asylum.²³³ Those who argue in support of the concept of State sovereignty contend that a State should have the right to regulate and control persons who enter its territory.²³⁴

This chapter offers an analysis of the concept of State responsibility to protect analysed against the right to regulate, it seeks to demonstrate that Zambia like any other State party to the 1951 Refugee Convention and other human rights instruments has an international obligation to protect the rights of asylum seekers whether lawfully or unlawfully present with its territory, though similarly having the right to regulate, it cannot do so in breach of human rights and its international obligations. This argument will be fortified by giving an expose of State responsibility on the international minimum standards of treatment of persons and contrast it with examples of the common State practice on the treatment of asylum seekers found unlawfully present and argue that implementation of domestic immigration law on asylum seekers found unlawfully present in Zambia is a breach provisions relating to discrimination, non- penalisation and *non-refoulement* under the 1951 Refugee Convention and other international human rights instruments.

2. State responsibility and asylum seeker protection

State responsibility focuses on the accountability for consequences created by the unacceptable conduct of States on the international plane.²³⁵ It rests on the principle that every State must be held responsible for the performance of its international obligations under the rule of international law, whether such rules derive from custom or treaty law.²³⁶ The International Court of Justice ICJ recognised that obligations of States could be based on the so called elementary considerations of humanity.²³⁷ In Conclusion No. 81 (1997) the Executive

<https://www.jstor.org/stable/pdf/20033347.pdf?refreqid=excelsior%3Adbd1a58ad5456fdabe9e6bd8c507ca29>
accessed on 18.08.2019 at 09:15 hours

²³³James C. Hathaway, Rights of Refugees under International Law, Cambridge University Press, 2005, p.5

²³⁴ Laura Thompson, Protection of Migrant Rights and State Sovereignty available at https://www.iom.int/files/live/sites/iom/files/about-iom/docs/DDGs_commentary_Protection_of_Migrants.pdf
accessed on 18.08.2019 at 08:54 hours

²³⁵ Chaloka Beyani, State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law, Int'l Law journal of refugees. In B.S Chimni (Ed), International Refugee Law, Sage Publications, 2000, p.296

²³⁶ Daniel Warner, The refugee state and state protection, chapter in Refugee Rights and Realities, Evolving International Concepts and Regimes (Frances Nicholson and Patrick Twomey, Eds), Cambridge University Press p.267

²³⁷ Corfu Channel Case (*United Kingdom v. Albania*); *Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, available at: <https://www.refworld.org/cases,ICJ,402398c84.html> [accessed 19 August 2019]

Committee (EXCOM) emphasized “that refugee protection is primarily the responsibility of States, and that UNHCR’s mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States.”²³⁸

State responsibility can be underscored by several more specific considerations such as in the area of transparent Refugee Status Determination (RSD), allowing access to the enjoyment of socio-economic rights,²³⁹ and refraining from acts or omissions done by a State’s organs that are considered as internationally wrong,²⁴⁰ including the respect of the principle of *non-refoulement*.²⁴¹ The State has a responsibility to protect the rights of asylum seekers found unlawfully present,²⁴² which emanates from international law, the difficulties encountered by asylum seekers can be attributed to the obvious gaps between the existence of a right to asylum and the lack of a corresponding State duty to grant asylum.²⁴³ The right to seek asylum is provided for under the UDHR²⁴⁴ which is a non-binding instrument and therefore does not besiege States with the obligation to uphold and protect that right. There is also no mention of this right in the 1951 Refugee Convention. This suggests that States have been very reluctant to give to this ‘right’ any substantive legal meaning. Conversely, the lack of urgency to protect this right can be attributed to the fact that international law does not place any duty on States to grant asylum.²⁴⁵ Refugee law therefore, has *lacunae* in terms of protecting asylum seekers, although it recognises them as a group of persons that need international protection, it does not recognise that they may be denied refuge or protection.²⁴⁶ It can be argued from this backdrop that most States including Zambia do not feel obligated to grant asylum or do so with unnecessary restrictions through immigration controls and other deterrent policies.²⁴⁷ It is submitted from this perspective that States have a right, rather than a duty, to grant asylum, which follows from their sovereign right to control admission into their territory.²⁴⁸

²³⁸ UNHCR, General Conclusion on International Protection, 17 October 1997, No. 81 (XLVIII) -1997, available at: <http://www.refworld.org/docid/3ae68c690.html>, para (d) accessed on 19.08.2019 at 10:05hours

²³⁹ Ibid, n 280

²⁴⁰ Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p.40, para. 1

²⁴¹ Ibid, n 280

²⁴² Article 31(1) of 1951 Refugee Convention

²⁴³ Catharine Phuong, Identifying state responsibilities towards refugees and asylum seekers, p.1 available at <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF> accessed on 16.08.2019

²⁴⁴ Article 14 of the UDHR

²⁴⁵ Ibid n 285, p.1

²⁴⁶ Guy Goodwin-Gill, The Refugee in International Law (2nd Ed, Clarendon Press, Oxford, 1996), p.v

²⁴⁷ Seunghwan Kim, Refugees, Citizenship and State Sovereignty, University of Victoria, PhD Thesis, 2016, p. 16

²⁴⁸ Ibid, n 285, p.2

2.1. International standards of treatment of asylum seekers and State responsibility

The 1951 Refugee Convention places obligations on State parties to accord certain standards of treatment to asylum seekers and to guarantee the protection of their rights including non-penalisation for illegal entry,²⁴⁹ *non-refoulement*²⁵⁰ and non-discrimination in the application of the Convention.²⁵¹ On the other hand, States reserve the right to determine the means of implementing the provisions of the 1951 Refugee Convention to ensure that asylum seekers are protected, this is achieved through legislative enactments or administrative procedures.²⁵²

The benchmark used to determine whether a State has attained the international standards on treatment of asylum seekers can be by looking at its domestic legislation and the practice and procedures in place.²⁵³ In most cases, however, a breach of international duty to protect asylum seekers arises where domestic legislation and available administrative procedures fail to offer such protection.²⁵⁴ The refugee debate in international law as characterised by the principle of State sovereignty and related principles of territorial supremacy and self-preservation on the one hand and competing humanitarian principles deriving from general international law on the other are conflicting ends which can be said to be a source of refugee protection problems.²⁵⁵

The responsibility of State parties arising from the 1951 Refugee Convention on offering protection to persons who enter their territories and seek protection can arise either through the asylum seekers availing themselves to the State and claiming asylum or protection,²⁵⁶ or by the State exercising jurisdiction through enforcement of immigration and deportation rules on the asylum seekers with a view to remove or refuse entry, or instituting immigration-related criminal proceedings such as prosecution for the use of false travel documents and illegal presence.²⁵⁷ In Zambia, the latter is the most commonly used method by authorities to assert control over asylum seekers found unlawfully present.²⁵⁸ The fact that

²⁴⁹ Article 31(1) of the Refugee Convention

²⁵⁰ Ibid, Article 33

²⁵¹ Ibid, Article 3

²⁵² Erika Feller et al, *Refugee Protection in International Law*, UNHCR's Global Consultation on International Protection (Cambridge University Press, 2003), p.216

²⁵³ G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn), Clarendon Press, Oxford, 1996), pp.230–41

²⁵⁴ Ian Brownlie, *System of the Law of Nations State Responsibility* (Part1) (Clarendon Press, Oxford, 1983), p.150

²⁵⁵ Daniel Warner, *The refugee state and state protection*, chapter in *Refugee Rights and Realities, Evolving International Concepts and Regimes* (Frances Nicholson and Patrick Twomey, Eds), Cambridge University Press p.262

²⁵⁶ Ibid, n 28

²⁵⁷ Ibid, n 28

²⁵⁸ See, n 29 *supra*

asylum seekers are exposed to the criminal justice system for illegal presence or use of false documentation is often used by States as a basis to deny asylum for breach of legal order.²⁵⁹

Although most States now have incorporated the provisions of the 1951 Refugee Convention under their domestic legislation, the reality on the ground is that when dealing with asylum seekers found unlawfully present within their territories, States often enforce immigration laws rather than refugee laws.²⁶⁰ The common State practice is that of prosecuting users of false travel documentation without regard to the circumstances of individual cases and not allowing opportunity for any claim for asylum to be considered by the responsible central authority before prosecution.²⁶¹ This leaves compliance of the laws to be achieved through the judicious use of executive discretion such as the Minister of Home Affairs, which are usually ineffective, take long, focus on State interests and do not guarantee protection to asylum seekers as most are denied their right to seek asylum and end up being *refouler* to their country of origin.²⁶²

2.2. The principle of *non-refoulement* and State responsibility

The principle of *non-refoulement* is the cornerstone of refugee law.²⁶³ It underscores all other provisions in the 1951 Refugee Convention and offers the last line of protection in any given circumstance for asylum seekers from being returned to territories where their lives will be at risk on account of race, religion and membership of a particular social group or political opinion.²⁶⁴ Article 33 of the 1951 Refugee Convention provides that:

“[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”²⁶⁵

The principle of *non-refoulement* is protected under several international human rights instruments.²⁶⁶ Arguably, it should be considered as an international customary practice,

²⁵⁹ (Ruta v Minister of Home Affairs Case CCT 02/18, para 5). See also (R v Uxbridge Magistrate Ex Parte Adimi [1999] EWHC 765; [2001] Q.B. 667, para 10)

²⁶⁰ See n 301

²⁶¹ Erika Feller et al, Refugee Protection in International Law, UNHCR’s Global Consultation on International Protection (Cambridge University Press, 2003), p.217

²⁶² Ibid, n 27

²⁶³ Andreas Zimmermann et al, The 1951 Refugee Convention and its 1967 Protocol: A Commentary, Oxford University Press, 2011, p.1335

²⁶⁴ See, n 305

²⁶⁵ Article 33 of the 1951 Refugee Convention

²⁶⁶ Article 3 of the Convention Against Torture

however, State practice and a lack of political will on the ratification of international legal instruments making provision for *non-refoulement* unseats it as a peremptory norm.²⁶⁷ The responsibility to protect principle may inform the international refugee law principle of *non-refoulement* to establish State responsibility in preventing asylum claimants from being sent back to face persecution or mass atrocities.²⁶⁸ However, despite there being jurisprudence prohibiting the Minister of Home Affairs in Zambia from declaring asylum seekers as illegal immigrants,²⁶⁹ such powers continue to be exercised in violation of the principle of *non-refoulement*. In *Habumugisha Innocent and Another v Attorney General*, the High Court held that the Minister had exceeded his powers to deport recognised refugees under the Immigration Act, though not fully addressing the principle of *non-refoulement*, the court found such act by the Minister as *ultra vires*.²⁷⁰ According to the EXCOM, States must be reminded that the application for the principle of *non-refoulement* is not anchored on whether or not the asylum seekers is lawfully present within their territories.²⁷¹ In practice, the circumstances of flight for asylum seekers may well generate criminal liability as where they enter illegally or without proper documentation. Asylum seekers in detention in most States are usually guilty of immigration related offences and non-serious crimes.²⁷² This puts them at risk of not being granted asylum and facing deportation.²⁷³ The existence of asylum seekers as a class known to and defined by general international law imports legal consequences for States regarding *non-refoulement* and standards of treatment of persons of concern.²⁷⁴ The Constitutional Court of South Africa which is a common law jurisdiction and whose decisions are persuasive on the Zambian courts, held that the principle of *non-refoulement* protects both *de facto* and *de jure* refugees.²⁷⁵ State practice, however, shows that this principle is constantly breached in the name of State sovereignty and without any international consequences.

²⁶⁷ See, n 305 p. 1343

²⁶⁸ <https://intergentes.com/informing-non-refoulement-obligations-with-responsibility-to-protect/> accessed on 30/08/2019 at 15:22 hours

²⁶⁹ *Re Edward Yapwantha* (1974 Z.R)

²⁷⁰ *Habumugisha Innocent and Another v Attorney General* 2016/HP/0024

²⁷¹ <https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> accessed on 30.08.2019 at 16:07 hours

²⁷² Guy S. Goodwin-Gill, International Law and the Detention of Refugees and Asylum Seekers, *The International Migration Review* 1986, Vol. 20, No. 2, p. 196

²⁷³ *Alex Ruta v Minister of Home Affairs* Case CCT 02/18

²⁷⁴ See, n 314

²⁷⁵ See, n 315

3. State sovereignty and the right to regulate

State sovereignty entails among other assumptions that the State system is committed exclusively to State values, autonomy and the non-permeability of State territory, and to the welfare of the State as a ‘monolithic’ entity.²⁷⁶ “The authority to protect national territory from the unplanned movements of people across borders has generated exceptional, often extra-legal, responses from countries throughout the world”.²⁷⁷ Most States peg sovereignty on standardised control of a national territory.²⁷⁸ However, when this control is threatened, the true sovereign can break from this uniformity and declare a ‘State of exception’.²⁷⁹ Under such conditions, the State authorises its agents to act outside the law in an anomalous zone where they retain the power of law but are not constrained by it.²⁸⁰ International human rights law has been a test on State sovereignty, this is because asylum seekers fall within a category of persons excepted from the effects of State sovereignty.²⁸¹ Owing to the unwillingness of States to protect them, means that when faced with their inflow, a State may be forced to push aside claims for territorial sovereignty.²⁸²

Human rights including the respect for freedom, commitments to meeting basic needs and sharing of resources to give effect to the claim of rights establishes a benchmark for States to claim sovereignty. However, a State which does not uphold human rights fails the test of minimum international legitimacy.²⁸³ The rationale is that the notion of State’s sovereignty implies ‘responsibility’, hence State’s authorities are responsible for protecting people’s safety and lives.²⁸⁴

The existing international law on migration does not undermine State sovereignty by protecting human rights as may be feared. Some argue that with the increase in the number of refugees there has been a decline in the nation-State and growth of refugee-States which causes embarrassment on the international system because refugees put in jeopardy the original notion

²⁷⁶ Louis Henkin, Human rights and state "sovereignty" (1995) 25 Ga J Int'l & Comp L 31, p.32

²⁷⁷ Loren B. Landau, Immigration and the State of Exception: Security and Sovereignty in East and Southern Africa, *Millennium: Journal of International Studies*, 2005. ISSN 0305-8298. Vol.34 No.2, p.325

²⁷⁸ *Ibid*, n 319, p.329

²⁷⁹ *Ibid*, n 319

²⁸⁰ *Ibid*, n 319

²⁸¹ *Ibid*, n 319

²⁸² Daniel Warner, The refugee state and state protection. In *Refugee Rights and Realities, Evolving International Concepts and Regimes* (Frances Nicholson and Patrick Twomey, Eds), Cambridge University Press p

²⁸³ James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, Oxford University Press 1991, p.113

²⁸⁴ Stefania Panebianco and Lole Fontana, When responsibility to protect ‘hits home’: The refugee crisis and the EU response, Department of Political and Social Sciences, University of Catania, Catania, Italy, available at <https://www.tandfonline.com/doi/pdf/10.1080/01436597.2017.1369035> accessed on 19.08.2019

of State sovereignty.²⁸⁵ The international law does not dictate upon States how to control migration flows, nor does it impose on how to formulate migration rules and regulations. What the law does is to prescribe that States ought to develop migration laws that protect and manage the rights of both documented and undocumented migrants (asylum seekers).²⁸⁶ Therefore, a need arises to strike a balance between migration law and policies and State sovereignty.²⁸⁷ Migration management laws should not infringe on fundamental human rights enshrined in the international law provided by various instruments.²⁸⁸ These laws should also not compromise the security and order public of the state.²⁸⁹

International law of human rights provides for every person the right to leave any country including his own.²⁹⁰ It does provide for States to allow entry and perhaps accord permanent residents. For a person to enter as a tourist or an immigrant the discretion lies with the State with the exception to this provision being the right given to asylum seekers in terms of the 1951 Refugee Convention.²⁹¹ Although these two principles seem to be in contention, State responsibility should take precedence in offering protection to asylum seekers within the territory of a host State. This is because even though States have the sovereign right to regulate entry into their territories they cannot do so in breach of human rights or against the influx of asylum seekers.

4. State practice on treatment of asylum seekers unlawfully present in Zambia.

According to a study by the UNHCR on the safeguards for asylum seekers in the context of irregular migration and the report from the Lawyers Committee for Human Rights on State procedures and practices relating to the detention of asylum seekers, there are several discrepancies in the interpretation and application for the provisions of the 1951 Refugee Convention in most States.²⁹² There are also different approaches to the incorporation of

²⁸⁵ See, n 88 p.120

²⁸⁶ Chigudu. D, International migration: The State sovereignty-migration nexus, Td, 10(4), December 2015, Special edition, p.5

²⁸⁷ See, n 22

²⁸⁸ See, n 22

²⁸⁹ See, n 22

²⁹⁰ Article 14 UDHR

²⁹¹ See, n 22

²⁹² Erika Feller et al, Refugee Protection in International Law UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003 p.206

international obligations into national law and practice, and different policy goals in the processes of refugee determination and migration management.²⁹³

Although Zambia has incorporated the provision of the 1951 Refugee Convention in its domestic refugee law²⁹⁴ and making provision for the right to apply for asylum irrespective of whether one entered the country legally or not,²⁹⁵ the common practice and reality on the ground is that of enforcing immigration laws,²⁹⁶ dual and flawed refugee status determination procedures²⁹⁷ and sanctions for the unlawful presence.²⁹⁸ These sanctions include arrests and detentions for prolonged periods of time.²⁹⁹ In 2014 for example, Zambian immigration authorities arrested and detained 21 Somalians for illegal presence.³⁰⁰

The principle of State sovereignty has led to a conclusion that each State retains exclusive control and absolute discretion-over the admission to its territory of foreign nationals, refugees or not.³⁰¹ In Zambia, asylum-seekers are commonly subjected to the same law as is applied to non-nationals generally (immigration laws).³⁰² If found to be illegal entry, entry without documents or with falsified documents, an asylum seeker can be prosecuted and imprisoned for a period of up to 2 years.³⁰³ Other applicants for asylum are subjected to lengthy detention where they are considered likely to abscond or viewed as a danger to the *ordre public* or national security.³⁰⁴ Though it may not be assumed that every illegal migrant arrested in Zambia was is an asylum seeker, the following national reports may help highlight the veracity of detention of migrants in the country:

a. Immigration Arrests 97 Foreigners

‘[On 2 February 2017] THE Immigration [officials] Department has in the last two months arrested [and detained] 97 persons for various immigration offences. Among those

²⁹³ Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, p. 22 available at <https://www.refworld.org/pdfid/3bf9123d4.pdf> accessed on 21.10.2020

²⁹⁴ Preamble of the Refugees Act No.1 of 2017

²⁹⁵ See, n 336, Sections 11 and 46

²⁹⁶ <http://www.daily-mail.co.zm/immigration-arrests-97-foreigners/> accessed on 04.09.2019 at 09:30 hrs

²⁹⁷ Chongo Chitupila, Country overview: Zambia ‘The administration of refugees In Zambia’, 2010, p.8

²⁹⁸ See, n 82, section 38

²⁹⁹ Judy Chinyemba, Undocumented immigration in Zambia: A Case study of Lusaka, MSc Thesis, University of South Africa, 2017, p.67

³⁰⁰ See, n 30

³⁰¹ Guy S. Goodwin-Gill, Entry and Exclusion of Refugees, The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees, 1982, p.291

³⁰² See, n 337 Section 38

³⁰³ Law Library Congress, Criminalization of Illegal Entry Around the World available at <https://www.loc.gov/law/help/illegal-entry/illegal-entry.pdf> accessed on 15.10.2020

³⁰⁴ See, n 335, p. 41

arrested are 33 in Lusaka who include eight Congolese, five Zimbabweans, five Ethiopians, two Rwandans, two Burundians and one Chinese while eight were arrested pending verification of their nationalities and immigration statuses. ...one Congolese was [were] convicted for unlawful entry and resisting arrest. ...[t]wo Rwandans refugees were convicted, and each sentenced to a fine of K1,500 or in default three months imprisonment for unlawful presence'.³⁰⁵

b. Zambia Arrests 99 Foreigners Over Various Immigration Offenses

“Namati Nshinka, spokesperson of the Immigration Department, said the prohibited immigrants were arrested during operations conducted between Feb. 8 and 12 in different parts of the country. She said 53 of those arrested were for the offense of unlawful stay, 27 for unlawful entry and 15 for unlawful entry and stay. Those arrested were for the offense of unlawful stay, 27 for unlawful entry and 15 for unlawful entry and stay. The department also secured 14 convictions of foreigners from various parts of world ranging for offenses of unlawful stay, illegal entry, doing business without permits and working without a valid employment permit”.³⁰⁶

c. Immigration Arrests 57 For Unlawful Entry, Convicts 7

“The Immigration Department has arrested 57 people countrywide for unlawful entry and stay, among other offenses. Among those arrested were Ethiopians, Somalians, Congolese, Burundians, Mozambicans were picked for unlawful entry and stay”.³⁰⁷

5. Refugee status determination procedure in Zambia

Zambia has a dual refugee status determination process. In order to apply for asylum one must present themselves to the Commissioner for Refugees (COR) based in Lusaka the capital city or to either the District Joint Operational Committee (DJOC) and the Provincial Joint Operational Committee (PJOC) the latter being essentially State security organs managed by staff who neither lawyers or judges but tend to be persons from the police and immigration authorities.³⁰⁸ Decisions made by the DJOC and the PJOC have no appeals procedure, meaning that once an asylum application has been rejected, the asylum seeker has no recourse against

³⁰⁵ See, n 338, *supra*

³⁰⁶ http://www.xinhuanet.com/english/2019-02/15/c_137822162.htm

³⁰⁷ <https://diggers.news/local/2018/08/09/immigration-arrests-57-for-unlawful-entry-convicts-7/>

³⁰⁸ Clare Darwin, Report on the situation for Refugees in Zambia, 2014, p.14 available at

that decision and will therefore be issued with a deportation order. Therefore, most refugees shun these options and prefer to attend the COR which is based in Lusaka and in the process end up in breach of immigration laws and for unlawful presence as they are required to present themselves with seven days (7) days of entry in the country.³⁰⁹

It must be noted on all these reported incidents are inconclusive, that there is need for more empirical evidence to determine how many asylum seekers and are in detention, reason for detention and the periods and reasons for their detention. Most of these arrests and detentions were put in effect after the enactment of the Refugees Act, which domesticated the 1951 Refugee Convention.³¹⁰ The most affected in most of these raids and arrests are asylum seekers from Somalia, Burundi, Rwanda, and DRC which till today are States that are notorious for producing refugees.³¹¹

6. Conclusion

There are two contending responsibilities that come with statehood, that is the responsibility to protect nationals and non-nationals within a state's territory and the responsibility to regulate who should enter its territories. "[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit a foreign national to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, especially if it considers their presence in the State opposed to its peace, order, and good government, or to its social or material interests".³¹² "However, the 1951 Refugee Convention has indirectly established the minimum standards of treatment of asylum seekers including those found unlawfully present. It has long been a principle of international customary law that States are free to control the entry and residence of migrants into their territory. States cannot however, do so in breach of principles of non-discrimination, *non-refoulement* and non-penalisation for illegal presence of refugees as laid down in the 1951 Refugee Convention and human rights instruments".³¹³

Every State that is party to international instruments should endeavour to uphold them in good faith. The common State practice, however, reveals that State actions when dealing

³⁰⁹ Refugee Act No. 1 of 2017

³¹⁰ See, n 325, Preamble

³¹¹ <https://diggers.news/local/2018/08/09/immigration-arrests-57-for-unlawful-entry-convicts-7/> accessed on 19.09.2019 at 10:30 hours

³¹² Attorney-General for Canada v Cain [1906] AC 542 at 546. Lord Atkinson cites with approval Vattel's Law of Nations, Book 1, s 231 and Book 2, s 125

³¹³ See, n 355

asylum seekers found unlawfully present within their territories is contrary to their international commitments. Zambia has been reported to have in place a State practice premised on arresting and detaining asylum seekers and UNHCRs person of concern (PoC) for being unlawfully present and subjecting them to the criminal justice system thereby jeopardising their prospects of successful asylum claims. This tentatively results in them being detained and *refouler* to their countries of origin from which they seek international protection. Such State practice is discriminatory and against the spirit of the 1951 Refugee Convention and several other international human rights instruments. In these premises it is important that the country shifts its focus towards strategies and policies that will endeavour to protect the rights of asylum seekers and refugees as ordained under Articles 3, 31(1) and 33 of the 1951 Refugee Convention.

Chapter Five

Recommendations and Conclusion

1. Introduction

“Zambia does not necessarily need new and separate laws on migration governance as it is party to various regional and international instruments”.³¹⁴ What however the country needs is to relook at its current regime and on the application, interpretation and enforcement of refugee and immigration laws. The Constitution also exacerbates this because it limits the freedom of movement for non-citizens.³¹⁵ This section seeks to offer practical solutions to some of the challenges created by the conflicting application of immigration and refugee laws on asylum seekers in Zambia. Recommendations at national and international levels will be made to alleviate some of the problems faced by asylum seekers.

2. Recommendations at national level

In order to effectively deal with the problem of detentions of asylum seekers at national level according to the protection offered under Article 31(1) of the 1951 Refugee Convention, the following recommendations can be considered at national level.

2.1 Reconciling Refugee Law and Immigration Law

Through this research it has been established that immigration laws and policies in Zambia are clearly in conflict with the Refugees Act. Although the provisions on unlawful presence may supersede Part V of the Immigration and Deportation Act, there is need to reinforce the superiority of the Refugees Act over the Immigration and Deportation Act and to reconcile their application, interpretation and enforcement of these two pieces of legislation. The Refugees Act makes provision for the right to seek asylum,³¹⁶ while the Immigration and Deportation Act may offer some form of protection to asylum seekers.³¹⁷ The specificity of the protection needs to be laid out in the Act.

Asylum seekers are by virtue of Article 31(1) of the 1951 Refugee Convention which has been domesticated by the Refugees Act, persons in need of surrogate protection and therefore entitled to enter a host country by whatever means.³¹⁸ The binary in terms of legislative enforcement needs to be clarified, the Immigration and Deportation Act should not

³¹⁴ International Organisation for Migration, Migration in Zambia: A COUNTRY PROFILE 2019, p.107

³¹⁵ Article 22 of the Zambian Constitution

³¹⁶ Section 11(1) of the Refugees Act No.1 of 2017

³¹⁷ Section 3(1) (c) of the Immigration Act No. 18 of 2010

³¹⁸ James C. Hathaway, Rights of Refugees under International Law, Cambridge University Press, 2005, p.5

apply to asylum seekers. Secondly, there is need to amend the Refugees Act by introducing a ‘supremacy clause’ with respect to its application to persons intending to seek asylum. Although unlawful presence of asylum seekers in Zambia is protected under section 46 of the Refugees Act, the provisions under Section 11 should be amended to remove the 7-day availing period as this hinders asylum seekers from coming forward to make their claim.

Additional safeguards could be at Section 3 of the Immigration Act could be amended to expressly provide that the Act does not apply to asylum seekers as this group of persons is only subject to refugee law.³¹⁹ This amendment can adopt the form of the Aliens Control Act 1966 of Lesotho which offers protection to asylum seekers from sanctions for unlawful entry.³²⁰ Immigration law should be dissociated from refugee law because these two regimes are not designed to complement each other, refugee laws are specifically meant to offer safeguards to persons in need of international protection, while immigration law is applicable to immigrants with the exception for asylum seekers.³²¹

2.2 Enactment of legislation dealing with child asylum seekers.

Zambia is a party to the CRC,³²² which places responsibility on State parties to protect the rights of children seeking asylum. The lack of individualised assessments by the immigration authorities, results in the continued detention of children and their families as well as of unaccompanied and separated children.³²³

Although, Zambia has a Juveniles Act, its provisions are only specific to children in conflict with the law and do not apply to children seeking asylum, this leaves asylum seeking children without any form of legal protection.³²⁴ The Committee on the Convention for the Rights of a Child has urged State parties to take measures to protect the best interest of unaccompanied or separated children.³²⁵ Zambia does not have a Children’s Act, it is therefore recommended that in order to comply with the CRC obligations, child specific legislation should be enacted which can also protect the rights of children seeking asylum. Alternatively,

³¹⁹ See Section 3 on application of the Act

³²⁰ Section 38 of the Aliens Control Act 1966-Lesotho

³²¹ Habumugisha Innocent and Another v Attorney General 2016/HP/0024

³²² https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en accessed on 18/11/2019 at 15:07

³²³ UN High Commissioner for Refugees (UNHCR), *UNHCR Submission on Zambia : UPR 28th Session* , March 2017, available at: <https://www.refworld.org/docid/5a12ae242.html> [accessed 18 November 2019]

³²³ General Comment 6 of 2005

³²⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR Submission on Zambia : UPR 28th Session* , March 2017, available at: <https://www.refworld.org/docid/5a12ae242.html> [accessed 18 November 2019]

³²⁵ General Comment 6 of 2005

the Refugees Act can be amended to make provision for child specific RSD procedures. This is because in the absence of such protective mechanism children end up being detained which violates the child's best interest,³²⁶ right to participation³²⁷ and the right to life and survival³²⁸ as they are exposed to vulnerability and exploitation during periods of detention.³²⁹

2.3. Policies and regulations offering alternatives to detention

The International Detention Coalition IDC has made strides in seeking alternatives to detention in Zambia, some of the successes have been through establishment of institutions designed for refugees awaiting relocation or resettlement to other countries.³³⁰ Part of the initiative was to develop a National Referral Mechanism NRM to offer help to vulnerable migrants who include asylum seekers",³³¹ in order for them to get specialised help during the process of seeking asylum. Through its National Action Plan to end detention of asylum seekers, the government launched the Protection Assistance to Vulnerable Migrants Policy Guidelines, these were developed to assist front line officials in Zambia to provide services to ensure migrants are protected in accordance with their needs. The aim was to also promote fundamental human rights for migrants in need of protection.³³² Whether or not these policies are being implemented needs auditing because unlawful presence still remains a challenge for asylum seekers in Zambia due to continued arrests and detentions of persons in need of international protection.³³³ More needs to be done in terms of training and information dissemination on the protection mandate under article 31(1) of the Refugee Convention.

2.4. Consolidate Refugee Status Determination procedures

Zambia currently has what can be termed a dual system for refugee status determination namely the provincial and Lusaka-based RSD procedures. The experience of each asylum seeker will differ depending on where they decide to apply for asylum.³³⁴ At provincial RSD, refugee

³²⁶ Article 3 of the CRC

³²⁷ Ibid, Art. 6

³²⁸ Ibid, Art.12

³²⁹ Guidelines for Protection Assistance to Vulnerable Migrants in Zambia, available at https://www.iom.int/files/live/sites/iom/files/Country/docs/Guidelines_Protection-Assistance-for-Vulnerable-Migrants.pdf accessed on 20/11/2019 at 14:32 hours

³³⁰ Available at <https://idcoalition.org/news/successful-alternative-in-zambia/> accessed on 18/11/2019 at 15:51 hours

³³¹ Available at <https://idcoalition.org/alternatives-to-detention-in-zambia/> accessed on 18/11/2019 at 16:00 hours

³³² See, n 376 supra

³³³ See n 30 supra

³³⁴ Chongo Chitupila, Country overview: Zambia 'The administration of refugees In Zambia', 2010, p.8

claims are determined based on the 1969 OAU Convention and recognition is on a *prima facie* basis,³³⁵ meaning that protection is granted to persons coming from a particular country and making claims during a particular period.³³⁶ The RSD officers at provincial level are either the Zambia police or immigration officials who may in some instances include officers from the Special branch of the Office of the President OP.³³⁷ The Lusaka based RSD procedures are conducted by the National Eligibility Committee NEC, they determine claims for asylum seekers who approach their offices or those that have been referred to them at provincial level. The NEC determines asylum claims based on the 1951 Refugees Convention.³³⁸ During the NEC interview asylum seekers are allowed legal representation and the right of appeal which may not be available at provincial level.³³⁹ Most asylum seekers may shun the provincial RSD in preference for the NEC as they may be denied entry if they do not meet the requirements.³⁴⁰ These two sets of refugee status determination are discriminatory and should be reconciled into one system which can help protect asylum seekers from penalisation for unlawful presence.

2.5. Training of Refugee Status Determination Officers

There is also a lack of knowledge generally on the rights of asylum seekers by frontline officials such as immigration officials, police officers, social welfare, health and prison officers and civil society personnel.³⁴¹ Therefore, there is need for more specialised training on the international standards, the purpose and procedures of asylum systems as well as on the rights of persons to seek asylum.³⁴² Special training should also be provided for RSD officers dealing with unaccompanied and separated children. The RSD officers should be adequately informed on the applicable law when dealing with asylum seekers and refugees especially about those that maybe present in country without legal documentation. Training should also extend to personnel in the prison services which forms part of the detention systems. They should be trained in identifying vulnerable migrants and help to have access to court or asylum systems.

³³⁵ See, n 381

³³⁶ Mathew Albert, Prima facie determination of refugee status An overview and its legal foundation, Working Paper Series No. 55, p. 9 available at <https://www.rsc.ox.ac.uk/files/files-1/wp55-prima-facie-determination-refugee-status-2010.pdf> accessed on 15.10.2020

³³⁷ UNHCR, Zambia: Analysis of the Gaps in Protection of Refugees, (2007), p.22

³³⁸ Ibid, n 382, p.8-9

³³⁹ Ibid, n 382, p.8

³⁴⁰ IOM, Migration in Zambia A COUNTRY PROFILE 2019, p.34 available at https://www.iom.int/sites/default/files/country/docs/zambia/zambia_migration_profile_2019.pdf accessed on 15.10.2020

³⁴¹ UNHCR Global Strategy, National Action Plan Zambia, Beyond Detention 2014-2019, p.2 available at <https://www.unhcr.org/566aa6429.pdf> accessed on 20/11/2019 at 16:44 hours

³⁴² See, n 351, p.10

2.6.A review of the role of the Office of the Commissioner for Refugees OCR

Office of the Commissioner for Refugees COR is established under the Refugees Act and is under the supervision of the Minister of Home Affairs.³⁴³ Part of the functions of the COR are the recognition of refugees and ensuring the provision of adequate facilities and services for the reception into and care for refugees within Zambia.³⁴⁴ Being the entity responsible for the reception of asylum seekers its mandate should also extend to information dissemination to asylum seekers, refugees, local communities and training of RSD officers. Although a total of 294 first line officials have in the past received some training in refugee law,³⁴⁵ no similar information dissemination has been embarked on for asylum seekers and refugees. In June 2016, the COR with the assistance of UNHCR embarked on a sensitisation exercise focusing schools and local communities.³⁴⁶ There is need to give COR a clear legislative mandate to inform and educate asylum seekers and refugees on their rights due to the fact that COR has the institutional mandate to help asylum seekers.

2.7.Information dissemination on the asylum processes and procedures and the role of Civil Society

Although the UNHCR has made attempts to provide information to asylum seekers on the current asylum procedure, the rights and obligations of asylum seekers and about existing refugee services in Zambia,³⁴⁷ more that needs to be done in ensuring that this information is received by its targeted audience in a language that they understand. This also applies to any communication or decisions made by the RSD officers regarding application for asylum. It has been reported that, RSD decisions are written in English to individuals that have no basic knowledge of the language.³⁴⁸ This is communication in form of letters which may contain information on their rights of appeal. However, due to the language barrier owed to the fact that most asylum seekers have may have no basic knowledge of English because they come from non-English speaking countries such as Congo DRC, Rwanda, Burundi etc., the rights of appeal, may never be exercised within the time provided and hence asylum seekers may end

³⁴³ Section 3 of the Refugees Act

³⁴⁴ See, n 390, section 4

³⁴⁵ BEYOND DETENTION, A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019, p.74

³⁴⁶ <https://zambianeye.com/unhcr-and-government-embark-on-sensitisation-in-schools/> accessed on 15.10.2020

³⁴⁷ <https://www.unhcr.org/50a6464d9.pdf> accessed on 20/11/2019 16:28 hours

³⁴⁸ See, n 382, p.9

up losing such rights.³⁴⁹ The State should therefore, take the responsibility and ensure that interpretation services are provided to asylum seekers in order to guarantee the due process of the RSD procedures.

Civil society organisation can also play a vital role in training and information dissemination on the rights of asylum seekers and refugees especially with regard to unlawful presence.

2.8.Civil Society involvement

There are a few civil society organisations CSOs in Zambia,³⁵⁰ which have objectives to ensure well-being of asylum seekers and refugees. However, most of these are engaged in offering humanitarian assistance through the UNHCR to recognised refugees that are in various camps across the country.³⁵¹ Few of these organisations seem to have a specific mandate on the protection of asylum seekers human rights.

The Legal Resources Foundation is one such organisation.³⁵² Although its objectives seem to be aligned to protection of asylum seekers rights, there is no data to show that these are being implemented. Asylum seekers continue to face detention for unlawful entry, yet there is no one reported case in the Superior Courts to challenge the *status quo*. It can be recommended that through the UNHCR, specific NGOs should be established with mandates similar to those of the University of Cape Town (UCT) Refugee Rights Clinic³⁵³ and the Legal Resources Centre.³⁵⁴ There is also a need for more advocacy on the rights of asylum seekers and refugees by already existing NGOs or new ones for that matter. These can replicate the mandate of organisations such Scalabrini Centre of Cape Town³⁵⁵ and Adonis Musati

³⁴⁹ See, n 382, p.9

³⁵⁰ Zambia Red Cross | Action Africa Help | Self Help Africa | Plan International | People in Need | Oxfam Caritas Czech Republic | CARE International | Norwegian Church Aid and World Vision Zambia.

³⁵¹ UNHCR Fact Sheet 2019 available at <https://reliefweb.int/report/zambia/unhcr-zambia-factsheet-june-2019> accessed on 22/11/2019 at 13:52 hours

³⁵² LRF provides legal aid services, prison visit programme and actual representation in courts of law are extended to other vulnerable groups such as refugees, prohibited immigrants and juvenile offenders <https://acjr.org.za/resource-centre/legal-resources-foundation-zambia> accessed on 22/11/2019 at 14:50 hours

³⁵³ <http://www.refugeerights.uct.ac.za/law-clinic> accessed on 22/11/2019 at 14:12 hours

³⁵⁴ LRC aims to function as an independent, client-based, non-profit public interest law clinic which uses the law as an instrument of justice and provides legal services for the vulnerable and marginalised, including the poor, homeless and landless people and communities of South Africa. <https://lrc.org.za/about/> accessed on 22/11/2019 at 14:23 hours

³⁵⁵ The Scalabrini Centre of Cape Town's vision is to foster the cultural, social and economic integration of migrants, refugees and South Africans into local society.. <https://scalabrini.org.za/about-us/> accessed on 22/11/2019 at 14:25 hours

Project³⁵⁶, which are all refugee rights centred NGOs. The Undikumbukire Project UP,³⁵⁷ which is a child rights-based organisation should also do more in helping unaccompanied and separated child asylum seekers in detention. This will increase advocacy and litigation against administrative decisions affecting the rights of asylum seekers and refugee and in Zambia.

2.9.The role of Law Association of Zambia and Legal Aid Board

The Law Association of Zambia LAZ is entity created by statute with the mandate to regulate the practice of law in the country including its members. Part of its mandate is to consider legislation relating to legal aid and ensure legal representation to persons who cannot afford it, promote law reform and participate in drafting legislation et cetera.³⁵⁸ With these responsibilities, it can be argued that it also has a role to play in protecting the rights of asylum seekers in the country. According to the legal practitioners' rules, a practitioner cannot offer *pro bono* legal services unless with approval of LAZ,³⁵⁹ the institution should therefore identify practitioners with skills and training in refugee law and human rights and allow them to offer free legal services to asylum seekers and refugees. For example, the National Legal Aid Clinic for Womxn is a LAZ project aimed offering free legal services to womxn and children in the country.³⁶⁰ Its mandate is, however, limited to gender-based violence and child abuse cases and does not extend to asylum seekers. As noted above, there have been cases of unaccompanied and separated child asylum seekers that have been detained in the country, this may improve the protection mechanisms.

The Legal Aid Board is also part of the solution to the problem on detention of asylum seeker for unlawful presence in the country. Through provision of legal aid and ensuring the right access justice is enhanced. The purposes of legal aid to provide legal services to vulnerable groups.³⁶¹

The Human Rights Commission which has the mandate to investigate human rights abuses in country, should also play an active role in protecting the rights of asylum seekers in

³⁵⁶ Adonis Musati Project seeks to empower marginalised refugees and migrants in South Africa through fostering sustainable support networks and encouraging personal development that achieves lasting change. <https://www.adonismusatiproject.org/> accessed on 22/11/2019 at 14:30 hours

³⁵⁷ Undikumbukire Project Zambia's casework provides us with insight into the systemic roadblocks that prevent juveniles from receiving justice. <http://www.upzambia.org/what-we-do> accessed on 22/11/2019 at 15:37 hours

³⁵⁸ Section 4 of the LAZ Act, Chapter 31 of the Laws of Zambia.

³⁵⁹ Rule 17(3) of the Legal Practitioners Rules

³⁶⁰ Greg Moran et al, Evaluation of the National Legal Aid Clinic for Women's Access to Justice Programme in Zambia, 2018, p.p.5-6

³⁶¹ Ministry of Justice, National Legal Aid Policy, 2018, p.vi, defines 'vulnerable groups' to include 'refugees' and 'asylum seekers.'

Zambia, this can be through prison visits initiatives³⁶² on regular intervals to conduct head counts of detained asylum seekers for various offences and holding the State accountable for such detentions in line with Article 31(1) of the 1951 Refugee Convention.

3. Recommendations at international level

The following recommendations can be considered at international level.

3.1.Revisiting the role of the Special Rapporteur on Refugees, Asylum seekers, Migrants and internally displaced persons.

Although the Special Rapporteur has the mandate to investigate and improve the treatment of refugees, asylum seekers, migrants, and internally displaced persons throughout the continent.³⁶³ Human rights violations for asylum seekers and refugees continue to be rampant on the continent.³⁶⁴ It can therefore be recommended that a treaty body with an investigative mandate should be established under the 1951 Refugee Convention.

3.2.The Common Southern African Development Community asylum system

The SADC member States have agreed to community obligations towards asylum seekers under the Declaration on refugee protection within the region. This stems from the recognition that “[t]he grant of asylum may place unduly heavy burdens on certain countries,” such that real global protection “cannot be achieved without international co-operation”.³⁶⁵ SADC member States have recognised that the challenges of refugees can only be dealt with through regional cooperation.³⁶⁶ However, whether this declaration is being adhered to or not leaves much to be desired. The European Union adopted common asylum systems with objective of harmonising common minimum standards for asylum systems and strengthening of financial solidarity with the creation of the European Refugee Fund.³⁶⁷ This system should be considered by members of the SADC in order to share responsibility for asylum seekers.

³⁶² Section 10(1) a of the Human Rights Commission Act

³⁶³ <https://ijrcenter.org/regional/african/special-rapporteur-on-refugees-asylum-seekers-migrants-and-internally-displaced-persons/>

³⁶⁴ <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1771-migrants-and-refugees-make-a-significant-contribution> accessed on 29/11/2019 at 15:17 hours

³⁶⁵ James C. Hathaway, Moving Beyond the Asylum Muddle, 2015 available at <https://verfassungsblog.de/moving-beyond-the-asylum-muddle-2/> accessed on 26/11/2019 at 16:06 hours

³⁶⁶ Declaration on refugee protection by SADC member states, para. F available at https://www.sadc.int/files/2013/5292/8381/Declaration_on_Refugee_Protection_within_Southern_Africa.pdf accessed on 29/11/2019 at 14:46 hours

³⁶⁷ https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en accessed on 29/11/2019 at 14:51 hours

4. Conclusion

There is need for concerted effort both at national and international levels in order to deal with the challenges faced by most asylum seekers in Zambia. The aim of this research was not to devise novel solutions to these challenges, but to build on already existing options and denouncing those that lack efficacy. This could be by taking measures such as training, information dissemination, legislative reforms and civil society taking a lead role in aggressive data collection of asylum seekers in detention and reasons thereof.

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